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Decl. of Paris 1856

Neutral flag covers enemy's good, except contraband.

Declar. of London of 1909.

Character of goods found on board, determined by character of vessel.

If vessel is enemy, goods are enemy in absence of proof of neutral character.

How many states must agree to make international L.?

When are we bound by it? Ratification? Justice?

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Leading Cases

on

International Law

By LAWRENCE B. EVANS, Ph. D.
Of the Massachusetts Bar

It is impossible that the human mind should be addressed to questions better worth its noblest efforts, offering a greater opportunity for usefulness in the exercise of its powers, or more full of historical and contemporary interest, than in the field of international rights and duties.

—*Elihu Root.*

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TO MY FRIEND
ROBERT LANSING

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PREFACE

Since international law is the result of the practice of all nations, an ideal collection of cases on the subject would represent the courts of all countries. This however is a degree of perfection which is impossible of realization, and from the standpoint of a student of the subject, it is not altogether desirable. The value of a case to a student is that it is a judicial discussion of the law applicable to a certain state of facts, and his interest should be centered upon the reasoning of the court rather than upon the conclusion at which it arrives. But the decisions of courts outside of common-law jurisdictions are usually not cast in such a form as to make them useful to students. For this reason and also because this collection was intended to be a brief one, it is confined to decisions from British and American jurisdictions. This however does not prevent considerable variety in point of view, since the collection comprises decisions from the highest courts of Massachusetts and New York, the several inferior Federal courts, the Court of Claims and the Supreme Court of the United States, while the far-flung empire of our British kinsmen is represented by decisions of the Judicial Committee of the Privy Council, the House of Lords, the High Court of Justice, the High Court of Admiralty, the High Court of Justiciary of Scotland, as well as by the decisions of courts sitting in Egypt, South Africa and Hong-Kong. As between British and American decisions, I am not conscious of any bias in favor of those of my own country, but have only sought to select such as would best serve the purpose. Of the cases, 102 in number, which constitute the collection, 48 were decided in British courts and 54 in American courts. In view of the great importance of the subject, I have also included a note on Aerial Jurisdiction,—a new topic in international law on which there is as yet no judicial decision. For economy of space some of the longer cases have been abbreviated by the omission of unessential matter. In every instance, however, the facts out of which the controversy arose are given, as well as a sufficient portion of the opin-

ion to show the line of reasoning by which the court reached its conclusion. Except for omissions or paraphrases which are indicated in the usual way, the texts followed have been reproduced *verbatim et literatim.*

In the preparation of the notes, I have hoped to offset some of the deficiencies which the brevity of this collection necessarily entails by a considerable citation of cases bearing on the topics under consideration and by references to the writings of scholars of authority. While the cases cited number about 800 and the references to the authorities comprise more than 200 titles, neither list is intended to be exhaustive. I have assumed that such classic commentaries as those of Wheaton, Phillimore, and Hall, as well as the many excellent treatises on international law as a whole which have appeared more recently are sufficiently familiar, and I have referred to them only when there was some special reason for doing so. Hence the writings cited in the notes are for the most part monographs upon special topics. Two exceptions to this statement are to be noted. On almost all topics reference has been made to Paul Fauchille's edition of Bonfils' *Manuel de Droit International Public,* which well represents the Continental point of view, and also to Professor John Bassett Moore's monumental *Digest of International Law,*—a work with which no student can be too well acquainted. For further bibliographies reference may be made to the excellent lists in Fauchille's edition of Bonfils and in Hershey, *The Essentials of International Public Law.* I am much indebted to both.

Lastly I would express my obligation to the West Publishing Co., St. Paul, for an advance copy of the opinion in The Appam, and to Mr. E. H. Redstone, the indefatigable librarian of the Social Law Library, Boston, whose assistance has been of the greatest value. To the users of this book I commend the caution of Littleton: "And know, my son, that I would not have thee believe that all that I have said in these books is law, for I will not presume to take this upon me. But of those things which are not law, inquire and learn of my wise masters learned in the law."

LAWRENCE B. EVANS.

Boston, November 22, 1916.

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Leading Cases on International Law

CHAPTER I.

THE NATURE AND AUTHORITY OF INTERNATIONAL LAW.

SECTION 1. THE NATURE AND SOURCES OF INTERNATIONAL LAW.

UNITED STATES v. THE SCHOONER LA JEUNE EUGENIE.

CIRCUIT COURT OF THE UNITED STATES. 1822.
2 Mason, 409.

STORY, J. This is a libel brought against the schooner La Jeune Eugenie, which was seized by Lieut. Stockton, on the coast of Africa, for being employed in the slave trade. The allegation asserts the offense in two forms; first, as against the slave trade acts of the United States; and secondly, as against the general law of nations. A claim has been given in by the French consul, in behalf of the Claimants, who are subjects of France, resident in Basseterre, in the island of Guadaloupe, as owners of the schooner; and there is also a Protest filed by the French consul against the jurisdiction of the court, upon the ground, that this is a French vessel, owned by French subjects, and as such, exclusively liable to the jurisdiction of the French tribunals, if she shall turn out, upon the evidence, to have been engaged in this dishonorable traffic. . . . It is contended on behalf of the plaintiffs, that this court has a right to entertain jurisdiction, and is bound to reject the claim of the defendants; First, because the African Slave Trade is repugnant to the law of nations; Secondly, because it is prohibited by the municipal laws

of France. On the other side it is contended, that the trade is not repugnant to the law of nations; and if prohibited by the laws of France, it is a municipal regulation, which the tribunals of France are alone competent to inquire into and punish. . . .

I shall take up no time in the examination of the history of slavery, or of the question, how far it is consistent with the natural rights of mankind. That it may have a lawful existence, at least by way of punishment for crimes, will not be doubted by any persons, who admit the general rights of society to enforce the observance of its laws by adequate penalties. . . . That it has interwoven itself into the municipal institutions of some countries, and forms the foundation of large masses of property in a portion of our own country, is known to all of us. . . . It would be unbecoming in me here to assert, that the state of slavery cannot have a legitimate existence, or that it stands condemned by the unequivocal testimony of the law of nations.

But this concession carries us but a very short distance towards the decision of this cause. It is not, as the learned counsel for the government have justly stated, on account of the simple fact, that the traffic necessarily involves the enslavement of human beings, that it stands reprehended by the present sense of nations; but that it necessarily carries with it a breach of all the moral duties, of all the maxims of justice, mercy and humanity, and of the admitted rights, which independent christian nations now hold sacred in their intercourse with each other. . . . It is of this traffic in the aggregate of its accumulated wrongs, that I would ask, if it be consistent with the law of nations? It is not by breaking up the elements of the case into fragments, and detaching them one from another, that we are to be asked of each separately, if the law of nations prohibits it. We are not to be told, that war is lawful, and slavery lawful, and plunder lawful, and the taking away of life is lawful, and the selling of human beings is lawful. Assuming that they are so under circumstances, it establishes nothing. It does not advance one jot to the support of the proposition, that a traffic, that involves them all, that is unnecessary, unjust, and inhuman, is countenanced by the eternal law of nature, on which rests the law of nations.

Now the law of nations may be deduced, first, from the general principles of right and justice, applied to the concerns of individuals, and thence to the relations and duties of nations; or,

secondly, in things indifferent or questionable, from the customary observances and recognitions of civilized nations; or, lastly, from the conventional or positive law, that regulates the intercourse between states. What, therefore, the law of nations is, does not rest upon mere theory, but may be considered as modified by practice, or ascertained by the treaties of nations at different periods. It does not follow, therefore, that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations. Nor is it to be admitted, that no principle belongs to the law of nations, which is not universally recognized, as such, by all civilized communities, or even by those constituting, what may be called, the christian states of Europe. Some doctrines, which we, as well as Great Britain, admit to belong to the law of nations, are of but recent origin and application, and have not, as yet, received any public or general sanction in other nations; and yet they are founded in such a just view of the duties and rights of nations, belligerent and neutral, that we have not hesitated to enforce them by the penalty of confiscation. There are other doctrines, again, which have met the decided hostility of some of the European states, enlightened as well as powerful, such as the right of search, and the rule, that free ships do not make free goods, which, nevertheless, both Great Britain and the United States maintain, and in my judgment with unanswerable arguments, as settled rules in the Law of Prize, and scruple not to apply them to the ships of all other nations. And yet, if the general custom of nations in modern times, or even in the present age, recognized an opposite doctrine, it could not, perhaps, be affirmed, that that practice did not constitute a part, or, at least, a modification, of the law of nations.

But I think it may be unequivocally affirmed, that every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations; and unless it be relaxed or waived by the consent of nations, which may be evidenced by their general practice and customs, it may be enforced by a court of justice, whenever it arises in judgment. And I may go farther and say, that no practice whatsoever can obliterate the fundamental distinction between right and wrong, and that every nation is at liberty to apply to another the correct

principle, whenever both nations by their public acts recede from such practice, and admit the injustice or cruelty of it.

Now in respect to the African slave trade, such as it has been described to be, and in fact is, in its origin, progress, and consummation, it cannot admit of serious question, that it is founded in a violation of some of the first principles, which ought to govern nations. It is repugnant to the great principles of christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice. When any trade can be truly said to have these ingredients, it is impossible that it can be consistent with any system of law, that purports to rest on the authority of reason or revelation. And it is sufficient to stamp any trade as interdicted by public law, when it can be justly affirmed, that it is repugnant to the general principles of justice and humanity.

Now there is scarcely a single maritime nation of Europe, that has not in the most significant terms, in the most deliberate and solemn conferences, acts, or treaties, acknowledged the injustice and inhumanity of this trade; and pledged itself to promote its abolition. . . . Our own country, too, has firmly and earnestly pressed forward in the same career. . . . At the present moment the traffic is vindicated by no nation, and is admitted by almost all commercial nations as incurably unjust and inhuman. It appears to me, therefore, that in an American court of judicature, I am bound to consider the trade an offense against the universal law of society, and in all cases where it is not protected by a foreign government, to deal with it as an offense carrying with it the penalty of confiscation. . . .

There is an objection urged against the doctrine, which is here asserted, that ought not to be passed over in silence; and that is, if the African slave trade is repugnant to the law of nations, no nation can rightfully permit its subjects to carry it on, or exempt them from obedience to that law; for it is said, that no nation can privilege itself to commit a crime against the law of nations by a mere municipal regulation of its own. In a sense the proposition is true, but not universally so. No nation has a right to infringe the law of nations, so as thereby to produce an injury to any other nation. But if it does, this is understood to be an injury, not against all nations, which all are bound or permitted to redress; but which concerns alone the nation injured. The independence of nations guarantees to each the right of guarding its own honour, and the morals and interests of its own subjects. No one has a right to sit in judgment

generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns. If a nation were to violate as to its own subjects in its domestic regulation the clearest principles of public law, I do not know, that that law has ever held them amenable to the tribunals of other nations for such conduct. It would be inconsistent with the equality and sovereignty of nations, which admit no common superior. No nation has ever yet pretended to be the *custos morum* of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy. . . .

I have come to the conclusion, that the slave trade is a trade prohibited by universal law, and by the law of France, and that, therefore, the claim of the asserted French owners must be rejected. That claim being rejected, I feel myself at perfect liberty, with the express consent of our own government, to decree, that the property be delivered over to the consular agent of the King of France, to be dealt with according to his own sense of duty and right. . . .

THE SCOTIA.

SUPREME COURT OF THE UNITED STATES. 1872.
14 Wallace, 170.

Appeal from the Circuit Court for the Southern District of New York.

[In 1863 the British government adopted a series of regulations for preventing collisions at sea. In 1864 the American Congress adopted practically the same regulations. Within a short time the governments of almost all maritime countries indicated their willingness that the British regulations should apply to their ships when outside British jurisdiction. In this state of the law, the Scotia, a British steamer, collided in mid-ocean with the Berkshire, an American sailing ship, and the latter was sunk. The owners of the Berkshire filed their libel in the United States District Court in New York, alleging that the collision occurred through the fault of the Scotia, and arguing that the respective rights and duties of the two vessels were determined by the general maritime law as it existed before the British legislation of 1863 which had been adopted by practically all

maritime nations. The District Court dismissed the libel, and the Circuit Court having affirmed that decree an appeal was taken to this court.]

Mr. Justice STRONG delivered the opinion of the court. . . .

It must be conceded, however, that the rights and merits of a case may be governed by a different law from that which controls a court in which a remedy may be sought. The question still remains, what was the law of the place where the collision occurred, and at the time when it occurred. Conceding that it was not the law of the United States, nor that of Great Britain, nor the concurrent regulations of the two governments, but that it was the law of the sea, was it the ancient maritime law, that which existed before the commercial nations of the world adopted the regulations of 1863 and 1864, or the law changed after those regulations were adopted? Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation. The Rhodian law is supposed to have been the earliest system of marine rules. It was a code for Rhodians only, but it soon became of general authority because accepted and assented to as a wise and desirable system by other maritime nations. The same may be said of the Amalphitan table, of the ordinances of the Hanseatic League, and of parts of the marine ordinances of Louis XIV. They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such. And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of

maritime nations? When, therefore, we find such rules of navigation as are mentioned in the British orders in council of January 9th, 1863, and in our act of Congress of 1864, accepted as obligatory rules by more than thirty of the principal commercial states of the world, including almost all which have any shipping on the Atlantic Ocean, we are constrained to regard them as in part at least, and so far as relates to these vessels, the laws of the sea, and as having been the law at the time when the collision of which the libellants complain took place.

This is not giving to the statutes of any nation extraterritorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that, by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations.

The consequences of this ruling are decisive of the case before us. The violation of maritime law by the Berkshire in carrying a white light (to say nothing of her neglect to carry colored lights), and her carrying it on deck instead of at her masthead, were false representations to the Scotia. They proclaimed that the Berkshire was a steamer, and such she was manifestly taken to be. The movements of the Scotia were therefore entirely proper, and she was without fault.

Decree affirmed, with costs.

IN THE MATTER OF AN ARBITRATION BETWEEN THE OSAKA SHOSEN KAISHA AND THE OWNERS OF THE STEAMSHIP PROMETHEUS.

SUPREME COURT OF HONG-KONG. 1906.
2 Hong-Kong Law Reports, 217.

[On February 10, 1904, the Osaka Shosen Kaisha, a Japanese steamship company, and the agents of the owners of the Norwegian steamship Prometheus signed a charter-party at Hong-Kong by which the steamship Prometheus was chartered to the Japanese company for six months. By clause 37 of the contract it was expressly agreed that "in case of war steamer not to be directed to any blockaded port nor to carry any contraband of war." When the charter-party was signed, hostilities had already broken out between Russia and Japan, but this was not known to the

signers of the contract, which however was made in anticipation of war. On February 14, the government of Russia published the list of articles which it declared to be contraband, which list concluded with the words, "In general, all articles intended for war, on sea or land, such as rice, provisions, horses, beasts of burden and others which can be of use in war, if they are carried for an enemy or to an enemy destination." While the Prometheus was at Kobe loading with a cargo for Formosa, the owners telegraphed the master of the vessel to "decline rice and provisions between Japanese ports." In consequence of the refusal of the master to accept the cargo of rice, sugar, and provisions, on the ground that they were contraband within the meaning of clause 37 of the charter-party, the steamship could not be used in the trade for which it was hired, and the Osaka Shosen Kaisha brought an action for breach of contract. The arbitrator who found the facts submitted to the court several questions, the first of which was, whether the cargo offered for shipment at Kobe was contraband within the meaning of the Russian declaration, and if so, whether that declaration is binding upon neutrals.]

THE CHIEF JUSTICE [SIR HENRY BERKELEY]: . . .

What then is the meaning of the expression "contraband of war" in its primary sense? Mr. Wharton, in his "Law Lexicon," defines contraband of war as meaning in its primary sense that which according to international law cannot be supplied to a hostile belligerent except at the risk of seizure and condemnation by the aggrieved belligerent. That seems to me a sound definition if you understand the word "risk" to mean that risk which is contemplated and recognized by the law of nations. Broadly stated then "contraband of war" is that which is so considered by the law of nations. The question which naturally follows is "What do you mean by the law of nations?" I answer that the law of nations is that system of rules respecting belligerent and neutral rights established by consent among the civilized and commercial nations of the world, partly written and partly arising out of custom and rendered stable by judicial decisions from time to time.

In my opinion, the expression contraband of war has a well-known and accepted meaning among the civilized commercial powers of the world. If that were not so we should not, as we do, find that expression used without definition in solemn treaties between the powers. The expression "contraband of war" is

used without any definition of its meaning in the Treaty of Paris of the 16th April, 1856. The inference from that fact is, to my mind, irresistible that there was no definition needed, because the expression had the same definite meaning in the minds of all the plenipotentiaries of the Powers parties to that treaty.

The Treaty of Paris, to which Russia is a party, and to which she still adheres, commences with the following preamble: . . . Then immediately follows this declaration:—"The above-mentioned plenipotentiaries being duly authorised resolved to concert among themselves as to the means of attaining this object; and having come to an agreement have adopted the following solemn Declaration:—

"(1) Privateering is, and remains abolished.

"(2) The neutral flag covers enemy's goods, with the exception of contraband of war.

"(3) Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.

"(4) Blockades in order to be binding, must be effective, that is to say maintained by a force sufficient really to prevent access to the coast of the enemy."

I draw special attention to the fact that the expression "contraband of war" is twice used in this declaration without being in any way defined. This declaration was designed to give effect to the opinion of the plenipotentiaries expressed in the preamble, viz. that it was to the advantage of the civilised world to establish a uniform doctrine on the subject of maritime law in time of war; and with that object in view to introduce certain "fixed principles." At the same sitting of the plenipotentiaries the following resolution was adopted (Protocol No. 24): "On the proposition of Count Walewski, and recognising that it is for the general interest to maintain the indivisibility of the four principles mentioned in the declaration signed this day, the plenipotentiaries agree that the powers which shall have signed it, or which shall have acceded to it, cannot hereafter enter into any arrangement in regard to the application of the right of neutrals in time of war which does not at the same time rest on the four principles which are the object of the said declaration."

It will be observed that by this Protocol the plenipotentiaries of Russia bind that Power not thereafter to adopt any attitude towards neutrals in time of war which does not rest upon the four principles enunciated in the declaration. This Protocol has an important bearing upon the contention at the Bar that

Russia as an independent sovereign state possesses, as a concomitant to the right to make war, the right to declare what shall or shall not be considered contraband of war.

I dwell here upon the fact that the expression "contraband of war" occurs twice in the declaration in the Treaty of Paris; that the expressions "privateering" and "blockade" occur each once; and that there is in that declaration no definition of the meaning of any of those expressions. Why was there this omission to define these expressions? Was it not because they each had in the minds of the Plenipotentiaries of the Powers a recognized meaning at the time when the treaty was signed? and because the expression "contraband of war" no more needed definition than the expressions "blockade" or "privateering" did? What then was the meaning which it must fairly be assumed the Plenipotentiaries attached to the expression "contraband of war" as used by them in the Treaty of Paris? It seems to me that the Plenipotentiaries had in their minds the meaning which at the time attached to the expression "contraband of war" resulting from the decisions of the courts of law of the nations of Europe and America; principally indeed the decisions in the English Courts on cases arising during the Napoleonic War. What then is the result of those decisions? What meaning has been thereby attached to the expression "contraband of war"? The result has been to attach to that expression the following twofold meaning:—(1) Absolute contraband of war—which includes everything useful for war only; (2) That which is conditional contraband of war—which includes all things which though useful for both peace and war become contraband if destined for the purposes of war: excluding from the meaning of contraband of war such things as are useful for the purposes of peace only. "Provisions," consequently, come within the definition of conditional contraband only, if and when destined for the enemy's forces; otherwise they are excluded from the definition. That is, in my opinion, the true meaning to be attached to the expression "contraband of war," and that is the sense which, in my opinion, that expression bears on a true construction of the Declaration of the Plenipotentiaries who signed the Treaty of Paris of 1856. That is, in my opinion, the sense in which the parties to the charter of the ship Prometheus must be taken to have understood the expression "contraband of war" when they agreed by Clause 37, that the ship Prometheus was not to "carry any contraband of war." To construe that expression as meaning whatever might at any time, that is to say from time to time, be declared by Russia to be

contraband, as the learned counsel for the owner contended I should, would be to import into the contract between the parties an element of uncertainty where none need exist. The contract was made in Hongkong, and therefore in the absence of evidence to the contrary which I could act upon the parties must be taken to have used the expression "contraband of war" in the sense in which [it] is understood in British courts of law, which is its sense in international law. It cannot be successfully contended that provisions would be regarded by British courts of law as unconditional contraband of war, or that there is any likelihood that they will ever take that view. Had this court been asked at any time between the signing of the charter party on the 10th February, 1904, and the issuing of the Russian declaration to construe the meaning of the words contraband of war it cannot be doubted that it would have excluded provisions from the category of unconditional contraband. It is contended however that the court ought to place a different meaning on that expression, after, and in view of, the terms of the Russian declaration, inasmuch as Russia being a sovereign independent power has a prerogative right to declare whatever she pleases to be contraband of war in any war in which she may be engaged, and that the effect of the Russian declaration having been to make provisions unconditionally contraband the master of the ship Prometheus was excused from loading them on his ship. In this contention I am unable to concur. In the view which I take of the effect of the Declaration under the Treaty of Paris of 1856, and of the undertaking by the several powers signatory thereto, given in the Protocol No. 24, not to depart from the principles enunciated in the Declaration, I think that Russia was not at liberty to declare provisions unconditional contraband of war; and that her declaration in that respect could not affect the contract between the parties to this charter party, even supposing it could be held that contraband of war means, as used in the charter party, whatever Russia may consider as such: for Russia having been a party to the solemn declaration of "fixed principles" under the Treaty of Paris was not at liberty to disregard those principles and was therefore bound to recognize, and act upon, the generally accepted rule of international law that provisions are not unconditional contraband. In this view I am supported by the decision in the case of Pollard v. Bell, 8 T. R. 434, where it was laid down that it is not competent to one nation to add to the law of nations by its own arbitrary ordinances without the concurrence of other

nations! Against the view which I hold, viz. that provisions are by the law of nations only conditional contraband, and that they were so regarded by the signatories to the Treaty of Paris, 1856, it was urged that notwithstanding that treaty the French when engaged in hostilities against China in 1885 intended to treat as contraband all shipments of rice destined to the open ports north of Canton. That fact however only amounts to this: that on that occasion France proposed to act in a manner which, had she been called upon to defend, she would have found difficulty in justifying, in the face of the declaration under the Treaty of Paris to which she was a party. Fortunately preliminaries of peace were settled before any seizures were in fact made by the French, and so the intended action of France cannot properly be drawn into a precedent against the principle enunciated in Pollard v. Bell. It is moreover to be remarked in connection with this intended action on the part of France in 1885 that her right to make provisions unconditional contraband was at the time denied by Great Britain. In Pollard v. Bell, 8 T. R. 434, decided in 1800, a French Prize Court, France then being at war with Great Britain, and Denmark being neutral, condemned a Danish ship on the ground that she was at the time of capture carrying a Scotchman as supercargo in violation of an ordinance by which it was declared that all ships should be confiscated "wherever there shall be found on board a supercargo, merchant, commissary, or chief officer being an enemy." In dealing with the ground assigned by the French Court condemning the ship Chief Justice Lord Kenyon said "this is one of the numberless questions that have arisen in consequence of the extraordinary sentences of condemnation passed by the courts of Admiralty in France during this war . . . to a question asked in the course of the argument, what are the rules on which the Courts of Admiralty profess to proceed, I answer, the law of nations, and such treaties as particular states have agreed shall be engrafted on that law. It was said by the defendant's counsel that an ordinance has the same force as a treaty, but without stopping to enlarge on the difference between them it is sufficient to say that the one is a contract made by the contracting parties and that the other is an ex-parte ordinance made by one nation only, to which no other state is a party; and I concur with Lord Mansfield in opinion that it is not competent to one nation to add to the law of nations by its own arbitrary ordinances without the concurrence of other nations." Continuing, his lordship said "let us see what was the foundation of the

condemnation in the French courts. It is stated that by their ordinance all ships are to be confiscated whensoever on board those ships shall be found a supercargo, merchant, commissary or chief officer being an enemy, but I say they had no right by making such an ordinance to bind other nations." What was the *ratio decidendi* in this case? The decision was based on the ground that the French courts had, in accordance with a French ordinance which was opposed to international law, decided that a ship was liable to be condemned merely because she carried on board an officer whose nationality was that of an enemy. Such then was the view expressed by Lord Kenyon as to the value and effect of a French ordinance which, departing from the recognised custom of nations, decreed that a ship might be condemned merely because she carried an officer of the nationality of the enemy. Applying the principle of that case to the present case, I say that the Russian declaration including provisions among the list of articles absolutely contraband and as departing from the recognised custom of nations had no binding effect upon other nations, and consequently could not excuse the non-performance of the contract under the charter party between the Osaka Shosen Kaisha and the owners of the s. s. Prometheus. It was contended on behalf of the owners of the Prometheus that the term 'law' as applied to this recognised system of principles and rules known as international law is an inexact expression, that there is, in other words, no such thing as international law; that there can be no such law binding upon all nations inasmuch as there is no sanction for such law, that is to say that there is no means by which obedience to such law can be imposed upon any given nation refusing obedience thereto. I do not concur in that contention. In my opinion a law may be established and become international, that is to say binding upon all nations, by the agreement of such nations to be bound thereby, although it may be impossible to enforce obedience thereto by any given nation party to the agreement. The resistance of a nation to a law to which it has agreed does not derogate from the authority of the law because that resistance cannot, perhaps, be overcome. Such resistance merely makes the resisting nation a breaker of the law to which it has given its adherence, but it leaves the law, to the establishment of which the resisting nation was a party, still subsisting. Could it be successfully contended that because any given person or body of persons possessed for the time being power to resist an established municipal law such law had no existence? The answer to such a contention would be that the

law still existed, though it might not for the time being be possible to enforce obedience to it. My answer to the first question put to me by the arbitrator must therefore, for the reasons I have given, be (1) that the cargo intended to be loaded by the charterers on the steamship Prometheus was not contraband of war within the meaning of the charter party; (2) that the Russian declaration constituting provisions unconditional contraband was not binding upon neutrals who were no party thereto, and consequently has no bearing upon the construction of the charter party between the Osaka Shosen Kaisha and the owners of the ship Prometheus. . . .

NOTE.—Whether international law is really law in the proper sense of that term has been a subject of much speculation. Practically all the larger treatises consider the question, and it is also well discussed in the following: J. B. Scott, "The Legal Nature of International Law," *Am. Jour. Int. Law*, I, 831, a brilliant article criticised by W. W. Willoughby in Ib. II, 357; Sir F. Pollock, "The Sources of International Law," *Col. Law Rev.*, II, 511; Baron Russell of Killowen, "International Law," *Law Quar. Rev.*, XII, 337. See also Thirty Hogsheads of Sugar v. Boyle (1815), 9 Cranch, 191, 198; The Antelope (1825), 10 Wheaton, 66, 120; Moore, *Digest*, I, 1. In The Ekaterinoslav (1905), Takahashi, 586, counsel for the claimants of the captured vessel argued that the declaration of the Powers and the resolutions of scholars constitute the rules and usage of international law now in force, and that the Rules of Capture at Sea resolved upon by the Institute of International Law at Turin in 1882, the proposals of the International Peace Conference of 1887, and the amendments resolved upon by the Institute of International Law at Paris in 1885 ought to be taken as the law governing the instant case. Furthermore it was said:

> There is no fixed International Law for a state to observe, but any just and impartial practice adopted by it according to circumstances becomes the standard of International Law. In applying the rules of International Law at the time of war, therefore, a state should take into consideration the spirit of the times and the most advanced theories of scholars, basing all its decisions on the great principle of universal benevolence.

In denying the petition, the Higher Prize Court of Japan said:

> The Rules of Capture at Sea resolved upon by the Institute of International Law at Turin . . . are nothing more than the desire of scholars, open to further discussion by the Powers. Under International Law they have no authority. . . . As to the advocate's vague argument for governing the solid business of the day by the principle of universal benevolence, it is inadmissible. It ignores the fact that war is indispensable in the present state of national intercourse.

International law is the outgrowth of modern European civilization and is applied in its fullness only to the states which are the product of that

civilization and to Japan. For the view taken of the relation of Mohammedan countries to international law, see the decisions of Lord Stowell in The Hurtige Hane (1801), 3 C. Robinson, 324; The Helena (1801), 4 Ib. 3; and The Madonna del Burso (1802), 4 Ib. 169. Extracts from these opinions are given in Scott, *Cases*, 2 *n*. Some of the rights usually recognized by international law as appertaining to sovereign states are still withheld from China, Siam, Persia, and Morocco. By express agreement of the Powers in 1856 Turkey was declared "admitted to participate in the advantages of the public law and system of Europe," but its sponsors nevertheless continued to maintain their consular jurisdiction therein. Japan was accorded full rank as a member of the family of nations when the Christian powers surrendered their consular jurisdiction in that Empire and remitted their subjects to the Japanese tribunals. See Moore, *Digest*, II, 654; Hishida, *The International Position of Japan as a Great Power*, ch. vi.

Section 2. The Relation of International Law to Municipal Law.

WEST RAND CENTRAL GOLD MINING COMPANY, LIMITED v. THE KING.

King's Bench Division of the High Court of Justice of Great Britain. 1905.
Law Reports [1905] 2 K. B. 391.

[The statement of facts and the first part of the opinion are printed, *post*, p. 164.]

Lord Alverstone, C. J. . . . The second proposition urged by Lord Robert Cecil, that international law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must shew either that the particular proposition put forward has been recognised and acted upon by our country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized

State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognised, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations. We adopt the language used by Lord Russell of Killowen in his address at Saratoga in 1896 on the subject of international law and arbitration: "What, then, is international law? I know no better definition of it than that it is the sum of the rules or usages which civilized States have agreed shall be binding upon them in their dealings with one another." In our judgment, the second proposition for which Lord Robert Cecil contended in his argument before us ought to be treated as correct only if the term "international law" is understood in the sense, and subject to the limitations of application, which we have explained. The authorities which he cited in support of the proposition are entirely in accord with and, indeed, well illustrate our judgment upon this branch of the arguments advanced on behalf of the suppliants; for instance, Barbuit's Case, Cas. t. Tal. 281, Triquet v. Bath, 3 Burr. 1478, and Heathfield v. Chilton, 4 Burr. 2016, are cases in which the Courts of law have recognised and have given effect to the privilege of ambassadors as established by international law. But the expressions used by Lord Mansfield when dealing with the particular and recognised rule of international law on this subject, that the law of nations forms part of the law of England, ought not to be construed so as to include as part of the law of England opinions of text-writers upon a question as to which there is no evidence that Great Britain has ever assented, and *a fortiori* if they are contrary to the principles of her laws as declared by her Courts. The cases of Wolff v. Oxholm, 6 M. & S. 92; 18 R. R. 313, and Reg. v. Keyn, 2 Ex. D. 63, are only illustrations of the same rule—namely, that questions of international law may arise, and may have to be considered in connection with the administration of municipal law. . . .

MORTENSEN v. PETERS.

HIGH COURT OF JUSTICIARY OF SCOTLAND. 1906.
14 Scots Law Times Reports, 227.

THE LORD JUSTICE GENERAL. The facts of this case are that the appellant being a foreign subject, and master of a vessel

registered in a foreign country, exercised the method of fishing known as otter trawling at a point within the Moray Firth, more than three miles from the shore, but to the west of a line drawn from Duncansby Head in Caithness to Rattray Point in Aberdeenshire; that being thereafter found within British territory, to wit, at Grimsby, he was summoned to the Sheriff Court at Dornoch to answer to a complaint against him for having contravened the 7th section of the Herring Fishery Act, 1889, and the bye-law of the Fishery Board, thereunder made, and was convicted. . . .

My Lords, I apprehend that the question is one of construction and of construction only. In this Court we have nothing to do with the question of whether the legislature has or has not done what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an act of the legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For us an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms. The counsel for the appellant advanced the proposition that statutes creating offences must be presumed to apply (1) to British subjects; and (2) to foreign subjects in British territory; but that short of express enactment their application should not be further extended. The appellant is admittedly not a British subject, which excludes (1); and he further argued that the *locus delicti,* being in the sea beyond the three-mile limit, was not within British territory; and that consequently the appellant was not included in the prohibition of the statute. Viewed as general propositions the two presumptions put forward by the appellant may be taken as correct. This, however, advances the matter but little, for like all presumptions they may be redargued, and the question remains whether they have been redargued on this occasion.

The first thing to be noted is that the prohibition here, a breach of which constitutes the offence, is not an absolute prohibition against doing a certain thing, but a prohibition against doing it in a certain place. Now, when a legislature, using words of admitted generality—"It shall not be lawful," &c., "Every person who," &c.—conditions an offence by territorial limits, it creates, I think, a very strong inference that it is, for the purpose specified, assuming a right to legislate for that territory against all persons whomsoever. . . .

It is said by the appellant that all this must give way to the

consideration that International Law has firmly fixed that a locus such as this is beyond the limits of territorial sovereignty; and that consequently it is not to be thought that in such a place the legislature could seek to affect any but the King's subjects.

It is a trite observation that there is no such thing as a standard of International Law, extraneous to the domestic law of a kingdom, to which appeal may be made. International Law, so far as this Court is concerned, is the body of doctrine regarding the international rights and duties of States which has been adopted and made part of the Law of Scotland. Now can it be said to be clear by the law of Scotland that the locus here is beyond what the legislature may assert right to affect by legislation against all whomsoever for the purpose of regulating methods of fishing? . . . [The remaining portion of the opinion is printed *post*, p. 69.]

NOTE.—See Holland, *Studies in International Law*, 176; Westlake, *Collected Papers*, 498; Picciotto, *The Relation of International Law to the Law of England and the United States;* Wright, *The Enforcement of International Law Through Municipal Law in the United States;* Butler, *The Treaty-Making Power of the United States*, II, sec. 399; Cobbett, *Cases and Opinions*, I, 1; Moore, *Digest*, I, 10. In 1765, Blackstone said, "The law of nations (whenever any question arises which is properly the subject of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land." *Commentaries*, IV, 67. To the same effect see Barbuit's Case (1736), Talbot, 281; Triquet v. Bath (1764), 3 Burrow, 1478; and Heathfield v. Chilton (1767), 4 Burrow, 2015, in which Lord Mansfield said, "The privileges of public ministers and their retinue depend upon the law of nations, which is part of the common law of England." The relation of international and municipal law was elaborately discussed in The Queen v. Keyn (1876), L. R. 2 Exc. D. 63, in which the doctrine of the early cases was somewhat modified by a closely divided court. In The Barenfels (Egypt, 1915), 1 Br. & Col. P. C. 122, 129, the British Prize Court for Egypt said:

> British law may be said to have always recognized International Law as a certain collection of certain rules which have become binding on States, either by immemorial usage or by virtue of agreement. And when once a rule of law is shewn to have received the assent of civilized States it will be deemed to have received also the assent of the British Courts, and will be applied by Courts sitting in any capacity which necessitates the straying from the ordinary paths of municipal laws to the fields of the Law of Nations.

In the United States prior to the adoption of the Constitution some of the States had recognized international law as part of their municipal law. For instance in Respublica v. De Longchamps (1784), 1 Dallas (Pa.) 111, 116, it was said, "The first crime in the indictment is an infraction of the

law of Nations. This law, in its full extent, is part of the law of this State, and is to be collected from the practice of different Nations, and the authority of writers.'' In Ware v. Hylton (1796), 3 Dallas, 199, 281, Justice Wilson said, ''When the United States declared their independence, they were bound to receive the law of nations in its modern state of purity and refinement.'' On the same subject see the charges delivered to the grand jury by Chief Justice Jay and Justice Wilson in Henfield's Case (1793), Wharton, *State Trials,* 49. In the exercise of its constitutional power to punish offenses against the law of nations Congress passed an act punishing piracy as defined by the law of nations, and it was held in United States v. Smith (1820), 5 Wheaton, 153, that this was a sufficient description of the offense. In The Nereide (1815), 9 Cranch, 388, 423, Chief Justice Marshall said that in the absence of any act of Congress to the contrary, ''the court is bound by the law of nations, which is a part of the law of the land.'' The same principle was set forth in Hilton v. Guyot (1895), 159 U. S. 113. The most complete expression of the view of the American courts is found in The Paquete Habana v. United States (1899), 175 U. S. 677, 694, in which Mr. Justice Gray said:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who, by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

In Great Britain a legislative act is presumed not to contravene international law, The Annapolis (1861), 30 L. J. P. & M. 201, while in the United States, it was said by Chief Justice Marshall that ''an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'' Murray v. The Charming Betsy (1804), 2 Cranch, 64, 118.

The relative authority of municipal and international law is of particular importance in controversies before prize courts and is discussed in The Maria (1799), 1 C. Robinson, 340; The Walsingham Packet (1799), 2 Ib. 77; The Recovery (1807), 6 Ib. 341; The Fox (1811), Edwards, 312; Le Louis (1817), 2 Dodson, 239; Cope v. Doherty (1858), 4 K. & J. 367; and The Zamora (1916), L. R. [1916] 2 A. C. 77, which is printed *post,* p. 343.

Among the American cases are Maisonnaire v. Keating (1815), 2 Gallison, 325, 334, and The Amy Warwick (1863), 2 Black, 635.

CHAPTER II.

PERSONS IN INTERNATIONAL LAW.

SECTION 1. STATES.

THORINGTON v. SMITH.

SUPREME COURT OF THE UNITED STATES. 1868.
8 Wallace, 1.

Appeal from the District Court for the Middle District of Alabama.

[In 1864 Thorington sold to Smith and Hartley some land in Alabama, of which State all the parties were residents. The purchase price was $45,000, of which $35,000 was paid in Confederate notes when the deed was executed. For the remainder a note was given promising to pay to Thorington or bearer "ten thousand dollars." At the time of the transaction Alabama was under the control of the Confederate government, and the only money in circulation was Confederate paper currency. Thorington brought suit on the note, and claimed payment of $10,000 in the only money now current, i. e. lawful money of the United States. The defendants answered that the land was worth only $3,000 in lawful money, and that the agreement of the parties was that the whole of the purchase price should be paid in the only money then circulating in Alabama, i. e. Confederate notes. The court below held that the contract was illegal because to be paid in such notes and dismissed the bill.]

The CHIEF JUSTICE [CHASE] delivered the opinion of the court.

The questions before us upon this appeal are these:

1. Can a contract for the payment of Confederate notes, made during the late rebellion, between parties residing within the so-called Confederate States, be enforced at all in the courts of the United States? . . . [The second and third questions are omitted.]

The first question is by no means free from difficulty. It cannot be questioned that the Confederate notes were issued in furtherance of an unlawful attempt to overthrow the government of the United States, by insurrectionary force. Nor is it a doubtful principle of law that no contracts made in aid of such an attempt can be enforced through the courts of the country whose government is thus assailed. But, was the contract of the parties to this suit a contract of that character? Can it be fairly described as a contract in aid of the rebellion?

In examining this question the state of that part of the country in which it was made must be considered. It is familiar history, that early in 1861 the authorities of seven States, supported, as was alleged, by popular majorities, combined for the overthrow of the National Union, and for the establishment, within its boundaries, of a separate and independent confederation. A governmental organization, representing these States, was established at Montgomery in Alabama, first under a provisional constitution, and afterwards under a constitution intended to be permanent. In the course of a few months, four other States acceded to this confederation, and the seat of the central authority was transferred to Richmond, in Virginia. It was, by the central authority thus organized, and under its direction, that civil war was carried on upon a vast scale against the government of the United States for more than four years. Its power was recognized as supreme in nearly the whole of the territory of the States confederated in insurrection. It was the actual government of all the insurgent States, except those portions of them protected from its control by the presence of the armed forces of the National government.

What was the precise character of this government in contemplation of law?

It is difficult to define it with exactness. Any definition that may be given may not improbably be found to require limitation and qualification. But the general principles of law relating to *de facto* government will, we think, conduct us to a conclusion sufficiently accurate.

There are several degrees of what is called *de facto* government.

Such a government, in its highest degree, assumes a character very closely resembling that of a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country. The distinguishing characteristic of such a government is,

that adherents to it in war against the government *de jure* do not incur the penalties of treason; and under certain limitations, obligations assumed by it in behalf of the country, or otherwise, will, in general, be respected by the government *de jure* when restored.

Examples of this description of government *de facto* are found in English history. The statute 11 Henry VII., c. 1, 2 British Stat. at Large, 82, relieves from penalties for treason all persons who, in defence of the king, for the time being, wage war against those who endeavor to subvert his authority by force of arms, though warranted in so doing by the lawful monarch, 4 [Blackstone's] Commentaries, 77.

But this is where the usurper obtains actual possession of the royal authority of the kingdom: not when he has succeeded only in establishing his power over particular localities. Being in possession, allegiance is due to him as king *de facto.*

Another example may be found in the government of England under the Commonwealth, first by Parliament, and afterwards by Cromwell as Protector. It was not, in the contemplation of law, a government *de jure,* but it was a government *de facto* in the most absolute sense. It incurred obligations and made conquests which remained the obligations and conquests of England after the restoration. The better opinion doubtless is, that acts done in obedience to this government could not be justly regarded as treasonable, though in hostility to the king *de jure.* Such acts were protected from criminal prosecution by the spirit, if not by the letter, of the statute of Henry the Seventh. It was held otherwise by the judges by whom Sir Henry Vane was tried for treason, 6 State Trials, 119, in the year following the restoration. But such a judgment, in such a time, has little authority.

It is very certain that the Confederate government was never acknowledged by the United States as a *de facto* government in this sense. Nor was it acknowledged as such by other powers. No treaty was made by it with any civilized state. No obligations of a National character were created by it, binding after its dissolution, on the States which it represented, or on the National government. From a very early period of the civil war to its close, it was regarded as simply the military representative of the insurrection against the authority of the United States.

But there is another description of government, called also by publicists a government *de facto,* but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1), that its existence is main-

tained by active military power, within the territories, and against the rightful authority of an established and lawful government; and (2), that while it exists, it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience, rendered in submission to such force, do not become responsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered, also, by civil authority, supported more or less directly by military force.

One example of this sort of government is found in the case of Castine, in Maine, reduced to British possession during the war of 1812. From the 1st of September, 1814, to the ratification of the treaty of peace in 1815, according to the judgment of this court in United States v. Rice, 4 Wheaton, 253, "the British government exercised all civil and military authority over the place." "The authority of the United States over the territory was suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conqueror. By the surrender, the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose." It is not to be inferred from this that the obligations of the people of Castine as citizens of the United States were abrogated. They were suspended merely by the presence, and only during the presence, of the paramount force. A like example is found in the case of Tampico, occupied during the war with Mexico by the troops of the United States. It was determined by this court, in Fleming v. Page, 9 Howard, 614, that, although Tampico did not become a port of the United States in consequence of that occupation, still, having come, together with the whole State of Tamaulipas, of which it was part, into the exclusive possession of the National forces, it must be regarded and respected by other nations as the territory of the United States. These were cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part.

The central government established for the insurgent States differed from the temporary governments at Castine and Tampico, in the circumstance, that its authority did not originate in lawful acts of regular war, but it was not, on that account, less actual or less supreme. And we think that it must be classed

among the governments of which these are examples. It is to be observed that the rights and obligations of a belligerent were conceded to it, in its military character, very soon after the war began, from motives of humanity and expediency by the United States. The whole territory controlled by it was thereafter held to be enemies' territory, and the inhabitants of that territory were held, in most respects, for enemies. To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned. That supremacy did not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But it made obedience to its authority in civil and local matters not only a necessity but a duty. Without such obedience, civil order was impossible.

It was by this government exercising its power throughout an immense territory, that the Confederate notes were issued early in the war, and these notes in a short time became almost exclusively the currency of the insurgent States. As contracts in themselves, except in the contingency of successful revolution, these notes were nullities; for, except in that event, there could be no payer. They bore, indeed, this character upon their face, for they were made payable only "after the ratification of a treaty of peace between the Confederate States and the United States of America." While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency, imposed on the community by irresistible force.

It seems to follow as a necessary consequence from this actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government, temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency, cannot be regarded for that reason only, as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relations to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are

without blame, except when proved to have been entered into with actual intent to further invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation. The first question, therefore, must receive an affirmative answer. . . .

NEELY v. HENKEL.

SUPREME COURT OF THE UNITED STATES. 1901.
180 U. S. 109.

Appeal from the Circuit Court of the United States for the Southern District of New York.

[Neely, an employe of the postal department of the Island of Cuba while that Island was occupied by the United States, was arrested in New York charged with the embezzlement and conversion of money and other public property in his possession. Application for his extradition was made by the United States in accordance with the provisions of the act of June 6, 1900, governing the surrender of persons charged with the commission of certain offenses in "any foreign country or territory . . . occupied by or under the control of the United States." Neely resisted extradition on the ground that Cuba was not a foreign country.]

MR. JUSTICE HARLAN delivered the opinion of the court. . . .

That at the date of the act of June 6, 1900, the Island of Cuba was "occupied by" and was "under the control of the United States" and that it is still so occupied and controlled, cannot be disputed. This court will take judicial notice that such were, at the date named and are now, the relations between this country and Cuba. So that the applicability of the above act to the present case—and this is the first question to be examined—depends upon the inquiry whether, within its meaning, Cuba is to be deemed a *foreign* country or territory.

We do not think this question at all difficult of solution if regard be had to the avowed objects intended to be accomplished by the war with Spain and by the military occupation of that Island. Let us see what were those objects as they are disclosed by official documents and by the public acts of the representatives of the United States. . . .

While by the act of April 25, 1898, declaring war between this country and Spain, the President was directed and empowered to use our entire land and naval forces, as well as the militia of the several States to such extent as was necessary, to carry such act into effect, that authorization was not for the purpose of making Cuba an integral part of the United States but only for the purpose of compelling the relinquishment by Spain of its authority and government in that Island and the withdrawal of its forces from Cuba and Cuban waters. The legislative and executive branches of the Government, by the joint resolution of April 20, 1898, expressly disclaimed any purpose to exercise sovereignty, jurisdiction or control over Cuba "except for the pacification thereof," and asserted the determination of the United States, that object being accomplished, to leave the government and control of Cuba to its own people. All that has been done in relation to Cuba has had that end in view and, so far as the court is informed by the public history of the relations of this country with that Island, nothing has been done inconsistent with the declared object of the war with Spain.

Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a Military Governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the Island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba.

It is true that as between Spain and the United States—indeed, as between the United States and all foreign nations—Cuba, upon the cessation of hostilities with Spain and after the Treaty of Paris was to be treated as if it were conquered territory. But as between the United States and Cuba that Island is territory held in trust for the inhabitants of Cuba to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.

In his message to Congress of December 6, 1898, the President said that "as soon as we are in possession of Cuba and have pacified the Island, it will be necessary to give aid and direction to its people to form a government for themselves," and that

"until there is complete tranquillity in the Island and a stable government inaugurated, military occupation will be continued." Nothing in the Treaty of Paris stands in the way of this declared object, and nothing existed, at the date of the passage of the act of June 6, 1900, indicating any change in the policy of our Government as defined in the joint resolution of April 20, 1898. In reference to the declaration in that resolution of the purposes of the United States in relation to Cuba, the President in his annual message of December 5, 1899, said that the pledge contained in it "is of the highest honorable obligation, and must be sacredly kept." Indeed, the Treaty of Paris contemplated only a temporary occupancy and control of Cuba by the United States. While it was taken for granted by the treaty that upon the evacuation by Spain, the island would be occupied by the United States, the treaty provided that "so long as such occupation shall last" the United States should "assume and discharge the obligations that may, under international law, result from the fact of its occupation for the protection of life and property." It further provided that any obligations assumed by the United States, under the treaty, with respect to Cuba, were "limited to the time of its occupancy thereof," but that the United States, upon the termination of such occupancy, would "advise any government established in the Island to assume the same obligations." . . .

NOTE.—Writers upon politics and government have made many elaborate classifications of states based chiefly upon their forms of government. From the standpoint of international law these differences in form may be disregarded except in so far as they affect international relations. As entities possessed of international rights and subject to international obligations, states are the subjects of international law. Those rights and obligations do not depend upon the form of their internal organization, although their ability to assert the one and to discharge the other may be much affected thereby. "No principle of general law," said Chief Justice Marshall, "is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights." The Antelope (1825) 10 Wheaton, 66; Westlake, *Collected Papers,* ch. vii. With rights go obligations, and a state which fails to provide for the discharge of its international responsibilities is nevertheless internationally liable. It is the duty of every member of the family of nations to provide itself with such a governmental organization as will enable it to meet all those duties and obligations which its position imposes upon it. The United States is an unhappy example of failure in this regard. It has several times happened, notably in the case of the Italian subjects who were lynched at New Orleans in 1891, that the Federal Government has had to confess that it owed duties which it was unable to discharge. In the New Orleans case, the Government of Italy with perfect right demanded that the guilty parties be prose-

cuted, but the State Department answered that under the American constitutional system such offenses were within the exclusive jurisdiction of the States. The Federal Government, however, paid a money indemnity to the families of the murdered men. President Harrison, who was then in office, recommended that the Federal courts be given jurisdiction over all cases involving a violation of treaty rights. As yet Congress has taken no action in the matter, thus leaving the Federal Government in what President Taft has described as "a pusillanimous position." See Borchard, secs. 82, 89, 90 and 91, and authorities cited. On all that has to do with international responsibility for the protection of aliens, Borchard is the best guide.

Since the Constitution of the United States vests the complete control of foreign affairs in the Federal Government, the States are unknown in international relations, but some of the States of the German Empire retain the right to act directly in international affairs. On the classification of states, see Bonfils (Fauchille), 91; Garner, *Introduction to Political Science*, chapters v, vi and vii; Oppenheim, I, Part I, ch. i; Moore, *Digest*, I, 21.

The position of the Papacy has been the subject of frequent discussion. See Bonfils (Fauchille), 221, arguing that the Papacy is a member of the community of states, and *contra*, Oppenheim, I, 157, Wheaton (Phillipson), 56, and a scholarly article by Dr. A. Pearce Higgins, "The Papacy and International Law," in *Journal of the Society of Comparative Legislation*, N. S. IX, 252. Since the Pope's legal status is based upon the Italian Law of Guarantees of May 13, 1871, a measure against which the Papacy still protests and the continuance of which rests in the discretion of the Italian Government, and since membership in the family of nations is at the present time always associated with sovereignty over definite territory, it is difficult to find a secular basis for the recognition of a purely secular pretension. This seems to have been the view of the First Hague Conference, which refused to admit the Papal envoy to membership.

Section 2. Protectorates.

THE KING v. THE EARL OF CREWE.

The Court of Appeal of Great Britain. 1910.
Law Reports [1910] 2 K. B. 576.

[By treaties with the native tribes, Bechuanaland was placed under the jurisdiction of the British Crown, and in 1885, by an Order in Council, was erected into a protectorate. By another Order in Council in 1891, the British High Commissioner for South Africa was empowered to provide for the peace and good order of all persons under the jurisdiction of the Crown in South Africa. A controversy having arisen in one of the tribes as to who was its rightful chief, the High Commissioner, under authority of the Order in Council of 1891, directed that Sekgome, one of the claimants who was then outside the tribal limits, should be detained in custody lest his return to the tribe should

provoke bloodshed. Sekgome then endeavored to obtain his release by a writ of habeas corpus directed to the Earl of Crewe, Secretary of State for the Colonies. The writ was denied on the ground that application had not been made to the right court and that the Earl of Crewe did not have the custody of the prisoner. On appeal this decision was affirmed. Only so much of one of the opinions is given as relates to the nature of protectorates.]

KENNEDY, L. J. . . . Sekgome was born and has remained a member of a native African tribe, dwelling in a region which has for some years . . . become officially entitled "The Batawana Native Reserve," near Lake Ngami, within the Bechuanaland Protectorate. Now the features of Protectorates differ greatly, and of this a comparison of the British Protectorates of native principalities in India, the British Protectorate of the Ionian Islands between 1815 and 1864, the Protectorate of the Federated Malay States, and the Bechuanaland Protectorate . . . affords ample illustration. . . . The one common element in Protectorates is the prohibition of all foreign relations except those permitted by the protecting State. Within a Protectorate, the degree and the extent of the exercise by the protecting State of those sovereign powers which Sir Henry Maine has described (International Law, p. 58) as a bundle or collection of powers which may be separated one from another, may and in practice do vary considerably. In this Bechuanaland Protectorate every branch of such government as exists—administrative, executive, and judicial—has been created and is maintained by Great Britain. What the idea of a Protectorate excludes, and the idea of annexation on the other hand would include, is that absolute ownership which was signified by the word "dominium" in Roman law, and which, though perhaps not quite satisfactorily, is described as territorial sovereignty. The protected country remains in regard to the protecting State a foreign country; and, this being so, the inhabitants of a Protectorate, whether native born or immigrant settlers, do not by virtue of the relationship between the protecting and the protected State become citizens of the protecting State. As Dr. Lushington said in regard to the inhabitants of the Ionian States, then under a British Protectorate, in his judgment in The Ionian Ships (1855), 2 Ecc. & Adm. 212, 226, "allegiance in the proper sense of the term undoubtedly they do not owe; because allegiance exists only between the Sovereign and his subjects, properly so

called, which they are not." A limited obedience the dwellers within a Protectorate do owe, as a sort of equivalent for protection; and in the present case the Orders in Council relating to the Bechuanaland Protectorate and the proclamations of the High Commissioner made thereunder imply the duty of obedience on the part of Sekgome and other persons within the area of the Protectorate to a practically unlimited extent. . . .

Appeal dismissed.

NOTE.—For the existing relation between the United States and Cuba, see the treaty of 1903 in Malloy, *Treaties and Conventions*, I, 362. For further discussion of the international position of protectorates see The Ionian Ships (1855), 2 Spinks, Ecc. & Adm. 212; The Charkieh (1873), L. R. 4 Ad. & Ecc. 59; Abd-ul-Messih v. Farra (1887), 13 A. C. 431. The anomalous situation of Egypt prior to the outbreak of the Great War was terminated on December 17, 1914, when the following announcement was made:

> His Britannic Majesty's Principal Secretary of State for Foreign Affairs gives notice that, in view of the state of war arising out of the action of Turkey, Egypt is placed under the protection of His Majesty, and will henceforth constitute a British Protectorate. The suzerainty of Turkey over Egypt is thus terminated, and His Majesty's Government will adopt all measures necessary for the defence of Egypt and the protection of its inhabitants and interests. The King has been pleased to approve the appointment of Lieutenant-Colonel Sir Arthur H. McMahon to be His Majesty's High Commissioner for Egypt.

On December 18, 1914, the British Government made this further announcement:

> In view of the action of His Highness Abbas Hilmi Pacha, lately Khedive of Egypt, who has adhered to the King's enemies, His Majesty's Government have seen fit to depose him from the Khediviate, and that high dignity has been offered, with the title of Sultan of Egypt, to His Highness Prince Hussein Kamel Pacha, eldest living Prince of the family of Mehemet Ali, and has been accepted by him.

The province of Tunis seems to stand in somewhat the same anomalous relation to France that Egypt did to England prior to 1914. In British India there are more than six hundred native states whose rulers are known as the Protected Princes. While they are almost independent in the regulation of their internal affairs, they have no international status. See Lee-Warner, *The Protected Princes of India;* Tupper, *Our Indian Protectorate;* Westlake, *Collected Papers,* 194. The tribes of American Indians are also without international status. Their peculiar position is discussed in The Cherokee Nation v. Georgia (1831), 5 Peters, 1, and in Worcester v. Georgia (1832), 6 Peters, 575. On the whole subject of protectorates see Moore, *Digest,* I, 27, and Bonfils (Fauchille), 102.

SECTION 3. BELLIGERENT OR INSURGENT COMMUNITIES.

THE THREE FRIENDS.

SUPREME COURT OF THE UNITED STATES. 1897.
166 U. S. 1.

Certiorari to the Circuit Court of Appeals for the Fifth Circuit.

[The steamer Three Friends which was fitted out on the seventh of May, 1896, in the St. John's River, Florida, with supplies, arms, and munitions intended for the service of the Cuban insurgents then in rebellion against the King of Spain, was seized by the collector of customs and libelled on behalf of the United States for violation of section 5283 of the Revised Statutes, the material portion of which provided for the forfeiture of any vessel and its equipment which should be fitted out in the United States for the purpose of waging hostilities in "the service of any foreign prince or state, or of any colony, district, or people." The owners of the vessel filed exceptions to the libel on the ground that it did not show any intent that the vessel should be employed "in the service of a foreign prince, or state, or of a colony, district or people with whom the United States are at peace," or of "any body politic recognized by or known to the United States as a body politic." These exceptions having been sustained, an appeal was taken by the United States to the Circuit Court of Appeals from which the case was brought on a writ of certiorari to this court.]

MR. CHIEF JUSTICE FULLER . . . delivered the opinion of the court. . . .

By referring to section three of the act of June 5, 1794, section one of the act of 1817, and section three of the act of 1818, . . . it will be seen that the words "or of any colony, district, or people" were inserted in the original law by the act of 1817, carried forward by the act of 1818, and so into section 5283.

The immediate occasion of the passage of the act of March 3, 1817, appears to have been a communication, under date of December 20, 1816, from the Portuguese minister to Mr. Monroe, then Secretary of State, informing him of the fitting out of privateers at Baltimore to act against Portugal, in case it should turn out that that Government was at war with the "self-styled Government of Buenos Ayres," and soliciting "the proposition to Congress of such provisions of law as will prevent such at-

tempts for the future." On December 26, 1816, President Madison sent a special message to Congress, in which he referred to the inefficacy of existing laws "to prevent violations of the obligations of the United States as a nation at peace towards belligerent parties and other unlawful acts on the high seas by armed vessels equipped within the waters of the United States," and, "with a view to maintain more effectually the respect due to the laws, to the character, and to the neutral and pacific relations of the United States," recommended further legislative provisions. This message was transmitted to the minister December 27, and he was promptly officially informed of the passage of the act in the succeeding month of March. Geneva Arbitration, Case of the United States, 138. In Mr. Dana's elaborate note to § 439 of his edition of Wheaton, it is said that the words "colony, district, or people" were inserted on the suggestion of the Spanish minister that the South American provinces in revolt and not recognized as independent might not be included in the word "state." Under the circumstances this act was entitled as "to preserve the neutral relations of the United States," while the title of the act of 1794 described it as "in addition" to the Crimes Act of April 30, 1790, 1 Stat. 112, c. 9, and the act of 1818 was entitled in the same way. But there is nothing in all this to indicate that the words "colony, district, or people" had reference solely to communities whose belligerency had been recognized, and the history of the times, an interesting review of which has been furnished us by the industry of counsel, does not sustain the view that insurgent districts or bodies, unrecognized as belligerents, were not intended to be embraced. On the contrary, the reasonable conclusion is that the insertion of the words "district or people" should be attributed to the intention to include such bodies, as, for instance, the so-called Oriental Republic of Artigas, and the Governments of Pétion and Christophe, whose attitude had been passed on by the courts of New York more than a year before in Gelston v. Hoyt, 13 Johns. 141, 561, which was then pending in this court on writ of error. There was no reason why they should not have been included, and it is to the extended enumeration as covering revolutionary bodies laying claim to rights of sovereignty, whether recognized or unrecognized, that Chief Justice Marshall manifestly referred in saying, in The Gran Para, 7 Wheat. 471, 489, that the act of 1817 "adapts the previous laws to the actual situation of the world." At all events, Congress imposed no

limitation on the words "colony, district, or people," by requiring political recognition.

Of course a political community whose independence has been recognized is a "state" under the act; and, if a body embarked in a revolutionary political movement, whose independence has not been, but whose belligerency has been, recognized, is also embraced by that term, then the words "colony, district, or people," instead of being limited to a political community which has been recognized as a belligerent, must necessarily be held applicable to a body of insurgents associated together in a common political enterprise and carrying on hostilities against the parent country, in the effort to achieve independence, although recognition of belligerency has not been accorded.

And as agreeably to the principles of international law and the reason of the thing, the recognition of belligerency, while not conferring all the rights of an independent state, concedes to the Government recognized the rights, and imposes upon it the obligations, of an independent state in matters relating to the war being waged, no adequate ground is perceived for holding that acts in aid of such a Government are not in aid of a state in the sense of the statute. . . .

Even if the word "state" as previously employed admitted of a less liberal signification, why should the meaning of the words "colony, district, or people" be confined only to parties recognized as belligerent? Neither of these words is used as equivalent to the word "state," for they were added to enlarge the scope of a statute which already contained that word. The statute does not say *foreign* colony, district, or people, nor was it necessary, for the reference is to that which is part of the dominion of a foreign prince or state, though acting in hostility to such prince or state. Nor are the words apt if confined to a belligerent. As argued by counsel for the Government, an insurgent colony under the act is the same before as after the recognition of belligerency, as shown by the instance of the colonies of Buenos Ayres and Paraguay, the belligerency of one having been recognized but not of the other, while the statute was plainly applicable to both. Nor is district an appropriate designation of a recognized power *de facto,* since such a power would represent not the territory actually held but the territory covered by the claim of sovereignty. And the word "people," when not used as the equivalent of state or nation, must apply to a body of persons less than a state or nation, and this meaning

would be satisfied by considering it as applicable to any consolidated political body.

In United States v. Quincy, 6 Pet. 445, 467, an indictment under the third section of the act of 1818, the court disposed of the following, among other points, thus: "The last instruction or opinion asked on the part of the defendant was: That according to the evidence in the cause, the United Provinces of Rio de la Plata is, and was at the time of the offence alleged in the indictment, acknowledged by the United States, and thus was a 'state' and not a 'people' within the meaning of the act of Congress under which the defendant is indicted; the word 'people' in that act being intended to describe communities under an existing government not recognized by the United States; and that the indictment therefore cannot be supported on this evidence.

"The indictment charges that the defendant was concerned in fitting out the Bolivar with intent that she should be employed in the service of a foreign 'people;' that is to say, in the service of the United Provinces of Rio de la Plata. It was in evidence, that the United Provinces of Rio de la Plata had been regularly acknowledged as an independent nation by the Executive Department of the Government of the United States, before the year 1827. And therefore it is argued that the word 'people' is not properly applicable to that nation or power.

"The objection is one purely technical, and we think not well founded. The word 'people,' as here used, is merely descriptive of the power in whose service the vessel was intended to be employed; and it is one of the denominations applied by the act of Congress to a foreign power. The words are, 'in the service of any foreign prince or state, or of any colony, district, or people.' The application of the word 'people' is rendered sufficiently certain by what follows under the videlicet, 'that is to say, the United Provinces of Rio de la Plata.' This particularizes that which by the word 'people' is left too general. The descriptions are no way repugnant or inconsistent with each other, and may well stand together. That which comes under the videlicet, only serves to explain what is doubtful and obscure in the word 'people.'"

All that was decided was that any obscurity in the word "people" as applied to a recognized government was cured by the videlicet.

Nesbitt v. Lushington, 4 T. R. 783, was an action on a policy of insurance in the usual form, and among the perils insured

against were "pirates, rovers, thieves," and "arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever." The vessel with a cargo of corn was driven into a port and was seized by a mob who assumed the government of her and forced the captain to sell the corn at a low price. It was ruled that this was a loss by pirates, and the maxim *noscitur a sociis* was applied by Lord Kenyon and Mr. Justice Buller. Mr. Justice Buller said: "'People' means 'the supreme power;' 'the power of the country,' whatever it may be. This appears clear from another part of the policy; for where the underwriters insure against the wrongful acts of individuals, they describe them by the names of 'pirates, rogues, thieves;' then having stated all the individual persons, against whose acts they engage, they mention other risks, those occasioned by the acts of 'kings, princes, and *people* of what nation, condition, or quality soever.' Those words therefore must apply to 'nations' in their collective capacity."

As remarked in the brief of Messrs. Richard H. Dana, Jr., and Horace Gray, Jr., filed by Mr. Cushing in Mauran v. Insurance Co., 6 Wall. 1, the words were "doubtless originally inserted with the view of enumerating all possible forms of government, monarchial, aristocratical, and democratic."

The British Foreign Enlistment Act, 59 Geo. III. c. 69, was bottomed on the act of 1818, and the seventh section . . . corresponded to the third section of that act. Its terms were, however, considerably broader and left less to construction. But we think the words "colony, district, or people" must be treated as equally comprehensive in their bearing here.

In the case of The Salvador, L. R. 3 P. C. 218, the Salvador had been seized under warrant of the governor of the Bahama Islands and proceeded against in the Vice-Admiralty Court there for breach of that section, and was, upon the hearing of the cause, ordered to be restored, the court not being satisfied that the vessel was engaged, within the meaning of the section, in aiding parties in insurrection against a foreign government, as such parties did not assume to exercise the powers of government over any portion of the territory of such government. This decision was overruled on appeal by the Judicial Committee of the Privy Council, and Lord Cairns, delivering the opinion, said: "It is to be observed that this part of the section is in the alternative. The ship may be employed in the service of a Foreign Prince, State, or Potentate, or Foreign State, Colony, Province, or part of any Province or People; that is to say, if you find any

consolidated body in the Foreign State, whether it be the Potentate, who has the absolute dominion, or the Government, or a part of the Province, or of the People, or the whole of the Province or the People acting for themselves, that is sufficient. But by way of alternative it is suggested that there may be a case where, although you cannot say that the Province, or the People, or a part of the Province or People are employing the ship, there yet may be some person or persons who may be exercising, or assuming to exercise, powers of Government in the Foreign Colony or State, drawing the whole of the material aid for the hostile proceedings from abroad; and, therefore, by way of alternative, it is stated to be sufficient, if you find the ship prepared or acting in the service of 'any person or persons exercising, or assuming to exercise, any powers of Government in or over any Foreign State, Colony, Province or part of any Province or People;' but that alternative need not be resorted to, if you find the ship is fitted out and armed for the purpose of being 'employed in the service of any Foreign State or People, or part of any Province or People.' . . .

"It may be (it is not necessary to decide whether it is or not) that you could not state who were the person or persons, or that there were any person or persons exercising, or assuming to exercise, powers of Government in Cuba, in opposition to the Spanish authorities. That may be so: their Lordships express no opinion upon that subject, but they will assume that there might be a difficulty in bringing the case within that second alternative of the section, but their Lordships are clearly of opinion that there is no difficulty in bringing the case under the first alternative of the section, because their Lordships find these propositions established beyond all doubt,—there was an insurrection in the island of Cuba; there were insurgents who had formed themselves into a body of people acting together, undertaking and conducting hostilities; these insurgents, beyond all doubt, formed part of the Province or People of Cuba; and beyond all doubt the ship in question was to be employed, and was employed, in connection with and in the service of this body of insurgents."

We regard these observations as entirely apposite, and while the word "people" may mean the entire body of the inhabitants of a state; or the state or nation collectively in its political capacity; or the ruling power of the country; its meaning in this branch of the section, taken in connection with the words "colony" and "district," covers in our judgment any insurgent or insurrectionary "body of people acting together, undertaking

and conducting hostilities," although its belligerency has not been recognized. Nor is this view otherwise than confirmed by the use made of the same words in the succeeding part of the sentence, for they are there employed in another connection, that is, in relation to the cruising, or the commission of hostilities, "against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace;" and, as thus used, are affected by obviously different considerations. If the necessity of recognition in respect of the objects of hostilities, by sea or land, were conceded, that would not involve the concession of such necessity in respect of those for whose service the vessel is fitted out.

Any other conclusion rests on the unreasonable assumption that the act is to remain ineffectual unless the Government incurs the restraints and liabilities incident to an acknowledgment of belligerency. On the one hand, pecuniary demands, reprisals, or even war, may be the consequence of failure in the performance of obligations towards a friendly power, while on the other, the recognition of belligerency involves the rights of blockade, visitation, search, and seizure of contraband articles on the high seas, and abandonment of claims for reparation on account of damages suffered by our citizens from the prevalence of warfare.

No intention to circumscribe the means of avoiding the one by imposing as a condition the acceptance of the contingencies of the other can be imputed.

Belligerency is recognized when a political struggle has attained a certain magnitude and affects the interests of the recognizing power; and in the instance of maritime operations, recognition may be compelled, or the vessels of the insurgents, if molesting third parties, may be pursued as pirates. The Ambrose Light, 25 Fed. Rep. 408; 3 Whart. Dig. Int. Law, § 381; and authorities cited.

But it belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed.

The distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material sense and of war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing

before, at the time and since this forfeiture is alleged to have been incurred.

On June 12, 1895, a formal proclamation was issued by the President and countersigned by the Secretary of State, informing the people of the United States that the island of Cuba was "the seat of serious civil disturbances accompanied by armed resistance to the authority of the established government, of Spain, a power with which the United States are and desire to remain on terms of peace and amity." . . .

July 27, 1896, a further proclamation was promulgated, and in the annual message of December 7, 1896, the President called attention to the fact that "the insurrection in Cuba still continues with all its perplexities," and gave an extended review of the situation.

We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place; and it cannot be doubted that, this being so, the act in question is applicable.

We see no justification for importing into section 5283 words which it does not contain and which would make its operation depend upon the recognition of belligerency; and while the libel might have been drawn with somewhat greater precision, we are of opinion that it should not have been dismissed. . . .

The decree must be reversed. . . .

MR. JUSTICE HARLAN dissenting. . . .

NOTE.—Belligerency has long been recognized as a definite status in international law which confers all the rights of an independent government so far as the waging of war is concerned. It is discussed in Rose v. Himeley (1808), 4 Cranch, 241, United States v. Palmer (1818), 3 Wheaton, 610; The Divina Pastora (1819), 4 Ib. 52; United States v. Klintock (1820), 5 Ib. 144; The Santissima Trinidad (1822), 7 Ib. 283, 337; The Prize Cases (1863), 2 Black, 635; Williams v. Bruffy (1877), 96 U. S. 176; Ford v. Surget (1879), 97 U. S. 594; Dow v. Johnson (1880), 100 U. S. 158, 164; United States v. Pacific Railroad (1887), 120 U. S. 227, 233; Underhill v. Hernandez (1897), 168 U. S. 250; Baldy v. Hunter (1898), 171 U. S. 388; Oakes v. United States (1899), 174 U. S. 778; The Amy Warwick (1862), 2 Sprague, 123. See also Moore, *Digest*, I, 164, and Wheaton (Dana), 34, note 15. This note by Richard Henry Dana is the classic statement of the law of belligerency.

When the United States accorded to the Confederate States the rights of a belligerent, the two became hostile powers and their inhabitants public enemies, Stovall, Administrator v. United States (1891), 26 Ct. Cl. 226,

240. Hence trade by citizens of the loyal States having no other object than to rescue their property in the South was trading with the enemy and was illegal, Montgomery v. United States (1873), 15 Wallace, 395; Cutner v. United States (1875), 17 Ib. 517; United States v. Lapène (1874), 17 Ib. 601; Dillon v. United States (1870), 5 Ct. Cl. 586. The recognition of belligerency on the part of neutral states is a recognition of a war status only and accords no rights not directly associated with the conduct of the war, Latham v. Clark (1870), 25 Ark. 574; Shortridge v. Mason (1867), 22 Fed. Cases, No. 12812. Although the Confederate States were recognized by President Lincoln as belligerents, it was held that such recognition did not imply any right on their part to establish prize courts for the condemnation of vessels or cargoes belonging to citizens of the loyal States, and the decisions of Confederate prize courts in cases of that kind were disregarded, The Lilla (1862), 2 Sprague, 177, 187. If the insurgent or de facto government succeeds in establishing itself, its acts from the beginning of its existence are regarded as those of an independent government, M'Ilvaine v. Coxe (1808), 4 Cranch, 209; United States v. Rice (1819), 4 Wheaton, 246; Underhill v. Hernandez (1897), 168 U. S. 250; Murray v. Vanderbilt (1863), 39 Barbour (N. Y.), 140.

As to how far the acts of a de facto government are binding upon its successor, see Republic of Peru v. Dreyfus (1888), L. R. 38 Chancery Division, 348; United States v. Prioleau (1865), 35 L. J. Chan. Rep. N. S. 7; United States v. McRae (1869), L. R. 8 Eq. 69; United States v. Home Insurance Co. (1875), 22 Wallace, 99; Williams v. Bruffy (1877), 96 U. S. 176; Coffee v. Groover (1887), 123 U. S. 1; Baldy v. Hunter (1898), 171 U. S. 388; MacLeod v. United States (1913), 229 U. S. 416.

Not every petty contest by irresponsible insurgents can be allowed to disturb the normal relations of states, as is inevitably the case when the insurgents are recognized as belligerents. It was long insisted that any body of insurgents who were not recognized as belligerents should be treated as criminals. If their operations took place on the high seas they were classed as pirates. The obvious injustice of this was so great that there has come to be acknowledged a status midway between peace and belligerency which is known as insurgency. That the recognition of belligerency did not apply to every minor act of insurrection was apparently admitted in The Nueva Anna and Liebre (1821), 6 Wheaton, 193. The principal case is the chief decision dealing with the distinction between belligerency and insurgency. The Neutrality Act of the United States and the British Foreign Enlistment Act, both of which were enacted for the purpose of assuring neutrality in a war between recognized belligerents, have been held to apply to insurgents, Wiborg v. United States (1896), 163 U. S. 632; The Salvador (1870), L. R. 3 P. C. 218. See also The Ambrose Light (1885), 25 Fed. 408 (a scholarly opinion); The Itata (1893), 56 Fed. 505; Moore, *Digest*, I, 242; II, 1076; George G. Wilson, "Insurgency and International Maritime Law," in *Am. Jour. Int. Law*, I, 46; *International Law Situations, 1901*, 108; *1902*, 57; *1904*, 26; *1907*, 127; *1912*, 9. These discussions at the Naval War College, the first of which was conducted by Professor John Bassett Moore, the others by Professor George G. Wilson, are unusually valuable contributions to a branch of international law which is still in process of formation.

Questions of international status are usually treated as political rather

than judicial questions, and the courts will adopt the decision of the political departments of the government, The Pelican (1809), Edwards, App. D.; Jones v. Garcia Del Rio (1823), Tur. & Rus. 297; Taylor v. Barclay (1828), 2 Sim. 213; The Ionian Ships (1855), 2 Spinks, 212; Republic of Peru v. Dreyfus (1888), L. R. 38 Ch. D. 348; Mighell v. Sultan of Johore (1894), 1 Q. B. 149; Gelston v. Hoyt (1818), 3 Wheaton, 246; United States v. Palmer (1818), 3 Ib. 610; The Divina Pastora (1819), 4 Ib. 52; The Santissima Trinidad (1822), 7 Ib. 283; Kennett v. Chambers (1852), 14 Howard, 38; The Three Friends (1897), 166 U. S. 1.

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CHAPTER III.

THE CONTINUING PERSONALITY OF STATES.

THE SAPPHIRE.

SUPREME COURT OF THE UNITED STATES. 1871.
11 Wallace, 164.

Appeal from the Circuit Court of the United States for the District of California.

[There having been a collision between the American ship Sapphire and the French transport Euryale, in the harbor of San Francisco, a libel was filed against the Sapphire in the name of the Emperor Napoleon III, then Emperor of the French, as owner of the Euryale. The decree of the District Court in favor of the libellant was affirmed by the Circuit Court, from which an appeal was taken in July, 1869. In September, 1870, the Emperor Napoleon was deposed. The case was argued before the Supreme Court in February, 1871.]

MR. JUSTICE BRADLEY delivered the opinion of the court.

The first question raised is as to the right of the French Emperor to sue in our courts. On this point not the slightest difficulty exists. A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling. Such a suit was sustained in behalf of the King of Spain in the third circuit by Justice Washington and Judge Peters in 1810. King of Spain v. Oliver, 2 Washington's Circuit Court, 431. The Constitution expressly extends the judicial power to controversies between a State, or citizens thereof, and *foreign States,* citizens, or subjects, without reference to the subject-matter of the controversy. Our own government has largely availed itself of the like privilege to bring suits in the English courts in cases growing out of our late civil war. Twelve or more of such suits

are enumerated in the brief of the appellees, brought within the last five years in the English law, chancery, and admiralty courts. There are numerous cases in the English reports in which suits of foreign sovereigns have been sustained, though it is held that a sovereign cannot be forced into court by suit. King of Spain v. Hullett, 1 Dow. & Clarke, 169; S. C., 1 Clarke & Finnelly, 333; S. C., 2 Bligh, N. S., 31; Emperor of Brazil, 6 Adolphus & Ellis, 801; Queen of Portugal, 7 Clarke & Finnelly, 466; King of Spain, 4 Russell, 225; Emperor of Austria, 3 De Gex, Fisher & Jones, 174; King of Greece, 6 Dowling's Practice Cases, 12; S. C., 1 Jurist, 944; United States, Law Reports, 2 Equity Cases, 659; Ditto, Ib. 2 Chancery Appeals, 582; Duke of Brunswick v. King of Hanover, 6 Beavan, 1; S. C., 2 House of Lords Cases, 1; De Haber v. Queen of Portugal, 17 Q. B. 169; also 2 Phillimore's International Law, part vi, chap. i; 1 Daniel's Chancery Practice, chap. ii, § ii.

The next question is, whether the suit has become abated by the recent deposition of the Emperor Napoleon. We think it has not. The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the Euryale, not as an individual, but as sovereign of France. This is substantially averred in the libel. On his deposition the sovereignty does not change, but merely the person or persons in whom it resides. The foreign state is the true and real owner of its public vessels of war. The reigning Emperor, or National Assembly, or other actual person or party in power, is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. The next successor recognized by our government is competent to carry on a suit already commenced and receive the fruits of it. A deed to or treaty with a sovereign as such inures to his successor in the government of the country. If a substitution of names is necessary or proper it is a formal matter, and can be made by the court under its general power to preserve due symmetry in its forms of proceeding. No allegation has been made that any change in the real and substantial ownership of the Euryale has occurred by the recent devolution of the sovereign power. The vessel has always belonged and still belongs to the French nation.

If a special case should arise in which it could be shown that injustice to the other party would ensue from a continuance of

the proceedings after the death or deposition of a sovereign, the court, in the exercise of its discretionary power, would take such order as the exigency might require to prevent such a result. . . . *Decree of the Circuit Court Reversed.* . . .

NOTE.—Accord: Barclay v. Russell (1797), 3 Ves. Jun. 424; City of Berne v. Bank of England (1804), 9 Ib. 347; United States of America v. McRae (1869), L. R. 8 Eq. 69; Gelston v. Hoyt (1818), 3 Wheaton, 246.

KEITH v. CLARK.

SUPREME COURT OF THE UNITED STATES. 1879.
97 U. S. 454.

Error to the Supreme Court of the State of Tennessee.

[The State of Tennessee organized in 1838 the Bank of Tennessee and agreed by a clause in its charter to receive its circulating notes in payment of taxes, but by a constitutional amendment adopted in 1865 it declared the notes issued by the bank during the Civil War null and void and forbade their acceptance for taxes. In accordance with this amendment the defendant, a collector of taxes, had refused such notes when tendered by the plaintiff, who now sues to recover the money which he had later paid under protest.]

MR. JUSTICE MILLER delivered the opinion of the court. . . .

The second proposition . . . is, as we understand it, that each of the eleven States who passed ordinances of secession and joined the so-called Confederate States so far succeeded in their attempt to separate themselves from the Federal government, that during the period in which the rebellion maintained its organization those States were in fact no longer a part of the Union, or if so, the individual States, by reason of their rebellious attitude, were mere usurping powers, all of whose acts of legislation or administration are void, except as they are ratified by positive laws enacted since the restoration, or are recognized as valid on the principles of comity or sufferance.

We cannot agree to this doctrine. It is opposed by the inherent powers which attach to every organized political society possessed of the right of self-government; it is opposed to the recognized principles of public international law; and it is opposed to the well-considered decisions of this court.

"Nations or States," says Vattel, "are bodies politic, societies of men united together for the promotion of their mutual safety and advantage by the joint efforts of their combined strength. Such a society has her affairs and her interests. She deliberates and takes resolutions in common, thus becoming a moral person who possesses an understanding and a will peculiar to herself, and is susceptible of obligations and rights." Law of Nations, sect. 1.

Cicero and subsequent public jurists define a State to be a body political or society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength. Wheaton, International Law, sect. 17. Such a body or society, when once organized as a State by an established government, must remain so until it is destroyed. This may be done by disintegration of its parts, by its absorption into and identification with some other State or nation, or by the absolute and total dissolution of the ties which bind the society together. We know of no other way in which it can cease to be a State. No change of its internal polity, no modification of its organization or system of government, nor any change in its external relations short of entire absorption in another State, can deprive it of existence or destroy its identity. Id., sect. 22.

Let us illustrate this by two remarkable periods in the history of England and France.

After the revolution in England, which dethroned and decapitated Charles I., and installed Cromwell as supreme, whom his successors called a usurper; after the name of the government was changed from the Kingdom of England to the Commonwealth of England; and when, after all this, the son of the beheaded monarch came to his own, treaties made in the interregnum were held valid,—the judgments of the courts were respected, and the obligations assumed by the government were never disputed.

So of France. Her bloody revolution, which came near dissolving the bonds of society itself, her revolutionary directory, her consul, her Emperor Napoleon, and all their official acts, have been recognized by the nation, by the other nations of Europe, and by the legitimate monarchy when restored, as the acts of France, and binding on her people.

The political society which in 1796 became a State of the Union, by the name of the State of Tennessee, is the same which is now represented as one of those States in the Congress of the United States. Not only is it the same body politic now, but it has

always been the same. There has been perpetual succession and perpetual identity. There has from that time always been a State of Tennessee, and the same State of Tennessee. Its executive, its legislative, its judicial departments have continued without interruption and in regular order. It has changed, modified, and reconstructed its organic law, or State Constitution, more than once. It has done this before the rebellion, during the rebellion, and since the rebellion. And it was always done by the collective authority and in the name of the same body of people constituting the political society known as the State of Tennessee.

This political body has not only been all this time a State, and the same State, but it has always been one of the United States,—a State of the Union. Under the Constitution of the United States, by virtue of which Tennessee was born into the family of States, she had no lawful power to depart from that Union. The effort which she made to do so, if it had been successful, would have been so in spite of the Constitution, by reason of that force which in many other instances establishes for itself a status, which must be recognized as a fact, without reference to any question of right, and which in this case would have been, to the extent of its success, a destruction of that Constitution. Failing to do this, the State remained a State of the Union. She never escaped the obligations of that Constitution, though for a while she may have evaded their enforcement. . . .

If the State of Tennessee has through all these transactions been the same State, and has been also a State of the Union, and subject to the obligations of the Constitution of the Union, it would seem to follow that the contract which she made in 1838 to take for her taxes all the issues of the bank of her own creation, and of which she was sole stockholder and owner, was a contract which bound her during the rebellion and which the Constitution protected then and now, as well as before. Mr. Wheaton says: "As to public debts,—whether due to or from the State,—a mere change in the form of the government, or in the person of the ruler, does not affect their obligation. The essential power of the State, that which constitutes it an independent community, remains the same: its accidental form only is changed. The debts being contracted in the name of the State, by its authorized agents, for its public use, the nation continues liable for them, notwithstanding the change in its internal constitution. The new government succeeds to the fiscal rights, and is bound to fulfil the fiscal obligations, of the former govern-

ment." International Law, sect. 30. And the citations which he gives from Grotius and Puffendorf sustain him fully.

We are gratified to know that the Supreme Court of the State of Tennessee has twice affirmed the principles just laid down in reference to the class of bank-notes now in question. In a suit brought by the State of Tennessee against this very bank of Tennessee, to wind up its affairs and distribute its assets, that court, in April, 1875, decreed, among other things, "that the acts by which it was attempted to declare the State independent, and to dissolve her connection with the Union, had no effect in changing the character of the bank, but that it had the same powers, after as before those acts, to carry on a legitimate business, and that the receiving of deposits was a part of such legitimate business." "That the notes of the bank issued since May 6, 1861, held by Atchison and Duncan, and set out in their answer, are legal and subsisting debts of the bank, entitled to payment at their face value, and to the same priority of payment out of the assets of the bank as the notes issued before May 6, 1861."

At a further hearing of the same case, in January, 1877, that court reaffirmed the same doctrine, and also held that the notes were not subject to the Statute of Limitations, and were not bound by it. State of Tennessee v. Bank of Tennessee, not reported. This decision was in direct conflict with schedule 6 of the constitutional amendment of 1865, which declared all issues of the bank after May 6, 1861, void, and it necessarily held that the schedule was itself void as a violation of the Federal Constitution. . . .

The judgment of the Supreme Court of Tennessee will, therefore, be reversed. . . .

Mr. Chief Justice Waite, Mr. Justice Bradley, and Mr. Justice Harlan dissented. . . .

Note.—The questions involved in the principal case were elaborately discussed in the series of cases known as the Tennessee Bank Cases, reported in 52 Tennessee, 1-566.

TERLINDEN v. AMES.

Supreme Court of the United States. 1902.
184 U. S. 270.

[Terlinden, a citizen of the Kingdom of Prussia, was charged with having committed in that country in the year 1901 various

acts of forgery and counterfeiting and was arrested in Chicago on complaint of the German consul, who alleged that he was a fugitive from justice and that he had committed offenses which were extraditable under the treaty made in 1852 by the United States and the Kingdom of Prussia. Terlinden petitioned for a writ of *habeas corpus* on the ground *inter alia* that the treaty between the United States and Prussia had been terminated by the formation of the German Empire in 1871. The District Court dismissed the petition and the petitioner appealed.]

Mr. Chief Justice Fuller . . . delivered the opinion of the court. . . .

This brings us to the real question, namely, the denial of the existence of a treaty of extradition between the United States and the Kingdom of Prussia, or the German Empire. In these proceedings the application was made by the official representative of both the Empire and the Kingdom of Prussia, but was based on the extradition treaty of 1852. The contention is that, as a result of the formation of the German Empire, this treaty had been terminated by operation of law.

Treaties are of different kinds and terminable in different ways. The fifth article of this treaty provided, in substance, that it should continue in force until 1858, and thereafter until the end of a twelve months' notice by one of the parties of the intention to terminate it. No such notice has ever been given, and extradition has been frequently awarded under it during the entire intervening time.

Undoubtedly treaties may be terminated by the absorption of Powers into other Nationalities and the loss of separate existence, as in the case of Hanover and Nassau, which became by conquest incorporated into the Kingdom of Prussia in 1866. Cessation of independent existence rendered the execution of treaties impossible. But where sovereignty in that respect is not extinguished, and the power to execute remains unimpaired. outstanding treaties cannot be regarded as avoided because of impossibility of performance.

This treaty was entered into by His Majesty the King of Prussia in his own name and in the names of eighteen other States of the Germanic Confederation, including the Kingdom of Saxony and the free city of Frankfort, and was acceded to by six other States, including the Kingdom of Würtemburg, and the free Hanseatic city of Bremen, but not including the

Hanseatic free cities of Hamburg and Lubeck. The war between Prussia and Austria in 1866 resulted in the extinction of the Germanic Confederation and the absorption of Hanover, Hesse Cassel, Nassau and the free city of Frankfort, by Prussia.

The North German Union was then created under the praesidium of the Crown of Prussia, and our minister to Berlin, George Bancroft, thereupon recognized officially not only the Prussian Parliament, but also the Parliament of the North German United States, and the collective German Customs and Commerce Union, upon the ground that by the paramount constitution of the North German United States, the King of Prussia, to whom he was accredited, was at the head of those several organizations or institutions; and his action was entirely approved by this Government. Messages and Documents, Dep. of State, 1867-8, Part I, p. 601; Dip. Correspondence, Secretary Seward to Mr. Bancroft, Dec. 9, 1867.

February 22, 1868, a treaty relative to naturalization was concluded between the United States and His Majesty, the King of Prussia, on behalf of the North German Confederation, the third article of which read as follows: "The convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between the United States on the one part and Prussia and other States of Germany on the other part, the sixteenth day of June, one thousand eight hundred and fifty-two, is hereby extended to all the States of the North German Confederation." 15 Stat. 615. This recognized the treaty as still in force, and brought the Republics of Lubeck and Hamburg within its scope. Treaties were also made in that year between the United States and the Kingdoms of Bavaria and Würtemburg, concerning naturalization, which contained the provision that the previous conventions between them and the United States in respect of fugitives from justice should remain in force without change.

Then came the adoption of the Constitution of the German Empire. It found the King of Prussia, the chief executive of the North German Union, endowed with power to carry into effect its international obligations, and those of his kingdom, and it perpetuated and confirmed that situation. The official promulgation of that Constitution recited that it was adopted instead of the Constitution of the North German Union, and its preamble declared that "His Majesty the King of Prussia, in the name of the North German Union, his Majesty the King of Bavaria, His Majesty the King of Würtemburg, His High-

ness the Grand Duke of Baden, and His Royal Highness the Grand Duke of Hesse and by Rhine for those parts of the Grand Duchy of Hesse which are situated south of the Main, conclude an eternal alliance for the protection of the territory of the Confederation, and of the laws of the same, as well as for the promotion of the welfare of the German people." As we have heretofore seen, the laws of the Empire were to take precedence of those of the individual States, and it was vested with the power of general legislation in respect of crimes.

Article 11 read, "The King of Prussia shall be the president of the Confederation, and shall have the title of German Emperor. The Emperor shall represent the Empire among nations, declare war, and conclude peace in the name of the same; enter into alliances and other conventions with foreign countries, accredit ambassadors, and receive them. . . . So far as treaties with foreign countries refer to matters which, according to Article IV, are to be regulated by the legislature of the Empire, the consent of the Federal Council shall be required for their ratification, and the approval of the Diet shall be necessary to render them valid."

It is contended that the words in the preamble translated "an eternal alliance" should read "an eternal union," but this is not material, for admitting that the Constitution created a composite State instead of a system of confederated States, and even that it was called a confederate Empire rather to save the *amour propre* of some of its component parts than otherwise, it does not necessarily follow that the Kingdom of Prussia lost its identity as such, or that treaties theretofore entered into by it could not be performed either in the name of its King or that of the Emperor. We do not find in this constitution any provision which in itself operated to abrogate existing treaties or to affect the status of the Kingdom of Prussia in that regard. Nor is there anything in the record to indicate that outstanding treaty obligations have been disregarded since its adoption. So far from that being so, those obligations have been faithfully observed.

And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance. During the period from 1871 to the present day, extradition from this country to Germany, and from Germany to this country, has been frequently granted

under the treaty, which has thus been repeatedly recognized by both governments as in force. Moore's Report on Extradition with Returns of all Cases, 1890.

In 1889, in response to a request for information on international extradition as practised by the German Government, the Imperial Foreign Office transmitted to our chargé at Berlin a memorial on the subject, in the note accompanying which it was said: "The questions referred to, in so far as they could not be uniformly answered for all the confederated German States, have been answered in that document as relating to the case of applications for extradition addressed to the Empire or Prussia." It was stated in the memorial, among other things:

"In so far as by laws and treaties of the Empire relating to the extradition of criminals, provisions which bind all the States of the union have not been made, those States are not hindered from independently regulating extradition by agreements with foreign States, or by laws enacted for their own territory.

"Of conventions, some of an earlier, some of a later period, for the extradition of criminals, entered into by individual States of the union with various foreign States, there exist a number, and in particular such with France, the Netherlands, Austria-Hungary, and Russia. With the United States of America, also, extradition is regulated by various treaties, as, besides the treaty of June 16, 1852, which applies to all of the States of the former North German Union, and also to Hesse, south of the Main, and to Würtemburg, there exist separate treaties with Bavaria and Baden, of September 12, 1853, and January 30, 1857, respectively." Moore's Report, 93, 94.

Thus it appears that the German Government has officially recognized, and continues to recognize, the treaty of June 16, 1852, as still in force, as well as similar treaties with other members of the Empire, so far as the latter has not taken specific action to the contrary or in lieu thereof. And see Laband, Das Staatsrecht des Deutschen Reiches, (1894), 122, 123, 124, 142.

It is out of the question that a citizen of one of the German States, charged with being a fugitive from its justice, should be permitted to call on the courts of this country to adjudicate the correctness of the conclusions of the Empire as to its powers and the powers of its members, and especially as the Executive Department of our Government has accepted these conclusions and proceeded accordingly.

The same is true as respects many other treaties of serious moment, with Prussia, and with particular States of the Empire, and it would be singular, indeed, if after the lapse of years of performance of their stipulations, these treaties must be held to have terminated because of the inability to perform during all that time of one of the parties.

In the notes accompanying the State Department's compilation of Treaties and Conventions between the United States and other Powers, published in 1889, Mr. J. C. Bancroft Davis treats of the subject thus:

"The establishment of the German Empire in 1871, and the complex relations of its component parts to each other and to the Empire, necessarily give rise to questions as to the treaties entered into with the North German Confederation and with many of the States composing the Empire. It cannot be said that any fixed rules have been established.

"Where a State has lost its separate existence, as in the case of Hanover and Nassau, no questions can arise.

"Where no new treaty has been negotiated with the Empire, the treaties with the various States which have preserved a separate existence have been resorted to.

"The question of the existence of the extradition treaty with Bavaria was presented to the United States District Court, on the application of a person accused of forgery committed in Bavaria, to be discharged on *habeas corpus*, who was in custody after the issue of a mandate, at the request of the minister of Germany. The court held that the treaty was admitted by both governments to be in existence.

"Such a question is, after all, purely a political one."

The case there referred to is that of In re Thomas, 12 Blatch. 370, in which the continuance of the extradition treaty with Bavaria was called in question. . . .

We concur in the view that the question whether power remains in a foreign State to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard. . . .

The District Court was right, and its final order is

Affirmed.

NOTE.—The continuity of the life of a state regardless of changes in its territory and form of government is a principle of cardinal importance in determining its international rights and liabilities. It is so well established that it is seldom questioned in any international controversy,

but a few examples will demonstrate the necessity of its recognition. Since the establishment of the independence of the United States, its area has been trebled by the annexation of Florida, and the territory extending from the Mississippi to the Pacific coast as well as Porto Rico, Alaska, Hawaii and the Philippines, but it remains the same political entity. Since 1789 France has been in turn a kingdom, a republic, an empire, a kingdom, a republic, an empire and again a republic, but throughout these changes it continues to be France, and it is bound by any engagements made in its behalf by any of the governmental agents which have been authorized from time to time to act for it. Perhaps the most striking example of a personality which has survived radical changes in both territory and government is the kingdom of Italy. By a series of annexations culminating in 1870, the kingdom of Sardinia, comprising the island of that name and the northwest corner of the Italian peninsula, succeeded in uniting with itself all the other states in Italy, which it organized into the kingdom of Italy with its seat at Rome. Although its territory was vastly increased, its name changed, a new government created and its capital established at a point outside of the original state, yet the kingdom of Italy regards itself as the same political entity as the kingdom of Sardinia and acknowledges itself bound by the treaties made by Sardinia. This however seems a somewhat forced identification, and some jurists of distinction, *e. g.* Holzendorff and Hall, think that the kingdom of Italy should be regarded as a new creation. The case is certainly much more extreme than that presented by the territorial growth of the United States and the governmental changes in France. For further discussion of the principle, see Rivier, I, 62; Bonfils (Fauchille), 130; Moore, *Digest*, I, 248.

CHAPTER IV.

JURISDICTION.

Section 1. The Territorial Sovereignty of the State.

LODEWYK JOHANNES DE JAGER v. THE ATTORNEY-GENERAL OF NATAL.

Judicial Committee of the Privy Council of Great Britain. 1907.
Law Reports [1907] Appeal Cases, 326.

This was a petition for special leave to appeal from a judgment, reported in (1901) Natal L. R. p. 65, of a special Court constituted by Act XIV. of 1900 of the Colony of Natal, whereby on March 14, 1901, the petitioner was adjudged guilty of high treason and was sentenced to five years' imprisonment and to pay a fine of £5000.

It alleged that the petitioner was a burgher of the late South African Republic, who for ten years and at the date of the outbreak of war in 1899 was peaceably residing in Waschbank, in Natal, and continued to do so after the battle of Elandslaagte on October 21 of that year while the Boer forces occupied that part of Natal in which Waschbank is situated and the British forces had retired to Ladysmith, whereby he lost the effective protection of Her late Majesty; that the Boers administered the government and remained in occupation till March, 1900; that the petitioner was thereupon compellable to join, and did join, the Boer forces, aided and assisted them both as commandant and as a commissioner and justice of the peace; and that after judgment as aforesaid he had undergone imprisonment and paid the fine imposed. . . .

Sir R. Finlay, K. C., and A. R. Kennedy, for the petitioner, contended that the petitioner owed only a local and temporary allegiance to Her Majesty whilst he was a resident in Natal and was actually enjoying Her Majesty's protection. The obligation ceased to be binding upon him when he was deprived of that

protection, and whilst, owing to the successful military occupation of the territory where he resided by the Boer forces, he was deprived of that protection, and was *de facto* under the government and control of the South African Republic. Aid and assistance given to the Boer forces by the petitioner under those circumstances were not treasonable, but acts which he was legally compellable to perform. It was not alleged against him that he had joined the invading forces prior to their having become established in possession and government of the territory. Thereupon, as a burgher of the Republic, he was compellable to serve. His duty of allegiance to the Queen had ceased, and his acts of service to his own Government were not treasonable as alleged. Reference was made to Coke's 3rd Inst. p. 4; Hale's Pleas of the Crown, vol. i. p. 94; Foster's Crown Cases, 2nd ed. (1776), 1st discourse, s. 2, 3rd ed. p. 185; 2 Halleck's International Law, 3rd ed. p. 450. . . .

Lord Loreburn, L. C. The petitioner Lodewyk Johannes De Jager was adjudged guilty of high treason by the special Court constituted by Act No. XIV. of 1900 of the Colony of Natal, and now seeks special leave to appeal to His Majesty in Council from that judgment and the sentence which followed. The circumstances and the questions of law raised are fully set out in the petition and need not be repeated here. Their Lordships have not to consider any facts or feature of this case except the points of law upon which Sir Robert Finlay insisted.

It is old law that an alien resident within British territory owes allegiance to the Crown, and may be indicted for high treason, though not a subject. Some authorities affirm that this duty and liability arise from the fact that while in British territory he receives the King's protection. Hence Sir R. Finlay argued that when the protection ceased its counterpart ceased also, and that as the British forces evacuated Waschbank on October 21, 1899, the petitioner was lawfully entitled to assist the invaders on and after October 24 without incurring the penalty of high treason.

Their Lordships are of opinion that there is no ground for this contention. The protection of a State does not cease merely because the State forces, for strategical or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the rights of an army in occupation. On the contrary, when such territory reverts to the control of its rightful Sovereign, wrongs done during the foreign occupation are cognizable by the

ordinary Courts. The protection of the Sovereign has not ceased. It is continuous, though the actual redress of what has been done amiss may be necessarily postponed until the enemy forces have been expelled. Their Lordships consider that the duty of a resident alien is so to act that the Crown shall not be harmed by reason of its having admitted him as a resident. He is not to take advantage of the hospitality extended to him against the Sovereign who extended it. In modern times great numbers of aliens reside in this and in most other countries, and in modern usage it is regarded as a hardship if they are compelled to quit, as they rarely are, even in the event of war between their own Sovereign and the country where they so reside. It would be intolerable, and must inevitably end in a restriction of the international facilities now universally granted, if, as soon as an enemy made good his military occupation of a particular district, those who had till then lived there peacefully as aliens could with impunity take up arms for the invaders. A small invading force might thus be swollen into a considerable army, while the risks of transport (which in the case of oversea expeditions are the main risks of invasion) would be entirely evaded by those who, instead of embarking from their own country, awaited the expedition under the protection of the country against which it was directed. These considerations would not justify a British Court in deciding any case contrary to the law, but they offer an illustration of consequences which would follow if the law were as the petitioner maintains. There is no authority which compels their Lordships to arrive at so strange a conclusion. The questions raised are, no doubt, of general importance, but their Lordships, after hearing the arguments of counsel in support of the petition, do not consider the case to be attended with doubt, and they will therefore humbly advise His Majesty to dismiss this petition. . . .

AMERICAN BANANA COMPANY v. UNITED FRUIT COMPANY.

SUPREME COURT OF THE UNITED STATES. 1909.
213 U. S. 347.

Error to the Circuit Court of Appeals for the Second Circuit.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought to recover threefold damages under the Act to Protect Trade against Monopolies. July 2, 1890, c. 647, Sec. 7. 26 Stat. 209, 210. . . .

The allegations of the complaint may be summed up as follows: The plaintiff is an Alabama corporation, organized in 1904. The defendant is a New Jersey corporation, organized in 1899. Long before the plaintiff was formed, the defendant, with intent to prevent competition and to control and monopolize the banana trade, bought the property and business of several of its previous competitors, with provision against their resuming the trade, made contracts with others, including a majority of the most important, regulating the quantity to be purchased and the price to be paid, and acquired a controlling amount of stock in still others. For the same purpose it organized a selling company, of which it held the stock, that by agreement sold at fixed prices all the bananas of the combining parties. By this and other means it did monopolize and restrain the trade and maintained unreasonable prices. The defendant being in this ominous attitude, one McConnell in 1903 started a banana plantation in Panama, then part of the United States of Colombia, and began to build a railway (which would afford his only means of export), both in accordance with the laws of the United States of Colombia. He was notified by the defendant that he must either combine or stop. Two months later, it is believed at the defendant's instigation, the governor of Panama recommended to his national government that Costa Rica be allowed to administer the territory through which the railroad was to run, and this although that territory had been awarded to Colombia under an arbitration agreed to by treaty. The defendant, and afterwards, in September, the government of Costa Rica, it is believed by the inducement of the defendant, interfered with McConnell. In November, 1903, Panama revolted and became an independent republic, declaring its boundary to be that settled by the award. In June, 1904, the plaintiff bought out McConnell and went on with the work, as it had a right to do under the laws of Panama. But in July, Costa Rican soldiers and officials, instigated by the defendant, seized a part of the plantation and a cargo of supplies and have held them ever since, and stopped the construction and operation of the plantation and railway. In August one Astua, by *ex parte* proceedings, got a judgment from a Costa Rican court, declaring the plantation to be his, although, it is alleged, the proceedings were not within the jurisdiction of Costa Rica, and were contrary to its laws and void. Agents of the defendants then bought the lands from Astua. The plaintiff has tried to induce the government of Costa Rica to withdraw its soldiers and also has tried

to persuade the United States to interfere, but has been thwarted in both by the defendant and has failed. The government of Costa Rica remained in possession down to the bringing of the suit.

As a result of the defendant's acts the plaintiff has been deprived of the use of the plantation, and the railway, the plantation and supplies have been injured. The defendant also, by outbidding, has driven purchasers out of the market and has compelled producers to come to its terms, and it has prevented the plaintiff from buying for export and sale. This is the substantial damage alleged. There is thrown in a further allegation that the defendant has "sought to injure" the plaintiff's business by offering positions to its employés and by discharging and threatening to discharge persons in its own employ who were stockholders of the plaintiff. But no particular point is made of this. It is contended, however, that, even if the main argument fails and the defendant is held not to be answerable for acts causing the damage were done, so far as appears, outside Rica for their effect, a wrongful conspiracy resulting in driving the plaintiff out of business is to be gathered from the complaint and that it was entitled to go to trial upon that.

It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress.

No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive. See The Hamilton, 207 U. S. 398, 403; Hart v. Gumpach, L. R. 4 P. C. 439, 463, 464; British South Africa Co. v. Companhia de Moçambique [1893], A. C. 602. They go further, at times, and declare that they will punish any one, subject or not, who shall do certain things, if they can catch him, as in the case of pirates on the high seas. In cases immediately affecting national interests they may go further still and may make, and, if they get the chance, execute similar threats as to acts done within another recognized jurisdiction. An illustration from our statutes is found with regard to criminal correspondence with foreign governments. Rev. Stat., Sec. 5335. See further Commonwealth v. Macloon, 101

Massachusetts, 1; The Sussex Peerage, 11 Cl. & Fin. 85, 146. And the notion that English statutes bind British subjects everywhere has found expression in modern times and has had some startling applications. Rex v. Sawyer, 2 C. & K. 101; The Zollverein, Swabey, 96, 98. But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. Slater v. Mexican National R. R. Co., 194 U. S. 120, 126. This principle was carried to an extreme in Milliken v. Pratt, 125 Massachusetts, 374. For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent. Phillips v. Eyre, L. R. 4 Q. B. 225, 239; L. R. 6 Q. B. 1, 28; Dicey, Conflict of Laws (2d ed.), 647. See also Appendix, 724, 726, Note 2, ibid.

Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to persons living within the power of the courts. A threat that depends upon the choice of the party affected to bring himself within that power hardly would be called law in the ordinary sense. We do not speak of blockade running by neutrals as unlawful. And the usages of speech correspond to the limit of the attempts of the lawmaker, except in extraordinary cases. It is true that domestic corporations remain always within the power of the domestic law, but in the present case, at least, there is no ground for distinguishing between corporations and men.

The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. "All legislation is *prima facie* territorial." Ex parte Blain, In re Sawers, 12 Ch. Div. 522, 528; State v. Carter, 27 N. J. (3 Dutcher) 499; People v. Merrill, 2 Parker, Crim. Rep. 590, 596. Words having universal scope, such as "Every contract in restraint of trade," "Every person who shall monopolize," etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute the improbability of the United

States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned. Other objections of a serious nature are urged but need not be discussed. . . .

Judgment affirmed.

NOTE.—The right of a sovereign state to control all persons and things within its territorial limits has been asserted in innumerable cases. On the whole subject, see Moore, *Digest*, II, ch. vi. The principle was formulated by Chief Justice Marshall in a much-quoted passage in The Schooner Exchange v. M'Faddon (1812), 7 Cranch, 116, 136:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied.

One of the most important applications of the principle that a state has jurisdiction over all persons and things within its territories is in relation to aliens. Since the state controls its own territory it may exclude aliens, Chae Chan Ping v. United States (1889), 130 U. S. 581; Fong Yue Ting v. United States (1893), 149 U. S. 698; Musgrove v. Chun Teong Toy (1891), 60 L. J. P. C. 28. It may also expel aliens, United States v. Williams (1904), 194 U. S. 279; Tiaco v. Forbes (1913), 228 U. S. 549. But in exercising its right to exclude or to expel, a state must be mindful of its duties as a member of the family of nations. The political and commercial relations of nations are so close and the privilege of entrance and residence has been so freely accorded that an arbitrary exclusion or expulsion may give rise to a diplomatic claim. Because of the protection which they receive from the state under whose jurisdiction they reside, aliens owe to it a "temporary allegiance," Carlisle v. United States (1873), 16 Wallace, 147, and must discharge many of the duties which are exacted of citizens, Lau Ow Bew v. United States (1892), 144 U. S. 47, 62. They are subject to the territorial law and may be punished for offenses committed against the laws under which they live, Luke v. Calhoun County (1875), 52 Ala. 115, 121; Moore, *Digest*, IV, 9. They are subject to taxation, even though discriminatory, Mager v. Grima (1850), 8 Howard, 490, and may be called upon for service in the police or the militia in the maintenance of public order, Moore, *Digest*, IV, 50, and their property within the jurisdiction may be requisitioned in order to meet the necessities of war, Alexander v. Pfau (1902), Transvaal Law Reports [1902] T. S. 155. See also Bonfils (Fauchille), 273; Borchard, ch. ii; J. H. Beale, "The

Jurisdiction of Courts over Foreigners," *Harvard Law Review,* XXVI, 193, 283.

Modern facilities for communication and transportation are such that in every country there are large numbers of aliens whose residence therein is of so fixed and permanent a character that they are in most respects identified with the country. Persons in the situation described may or may not be domiciled in the country of residence. Domicile has been defined as the place where a person "has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning" (Story, *Conflict of Laws,* sec. 41), as "a residence acquired as a final abode" (Wharton, *Conflict of Laws,* sec. 21), and as "a legal home" (Beale, *Cases on the Conflict of Laws,* III, 508). A judge, apparently of Irish extraction, described a man's domicile as the place where he might be expected to be when he was not in some other place. Every person must have a domicile. The domicile of origin of a legitimate child is the domicile of its father at the time of its birth, while that of an illegitimate child is that of its mother, Urquhart v. Butterfield (1887), 37 Ch. D. 357. The domicile of birth continues until another is obtained, The Venus (1814), 8 Cranch, 253, 278. In America a domicile of choice is usually held to continue until another is acquired, but the English courts hold that a domicile of choice may be abandoned without the acquisition of another, in which case the domicile of origin reverts, Udny v. Udny (1869), L. R. 1 H. L. 441. In order to acquire a domicile there must be both residence and intent to make the place of residence one's home, Bell v. Kennedy (1868), L. R. 1 H. L. (Scotch) 307. The best evidence of intent is the length of the residence, The Harmony (1800), 2 C. Robinson, 322, *post,* p. 219; The Ann Green (1812), 1 Gallison, 274, 284. Except in the case of the so-called Anglo-Indian domicile, The Indian Chief (1801), 3 C. Robinson, 12, the British courts assume that no length of residence by a European in an oriental country can effect such a merging in the community as will result in the acquisition of a civil domicile, Re Tootal's Trusts (1883), 23 Ch. Div. 532; Abd-ul-Messih v. Farra (1887), 13 A. C. 431; Abdallah v. Rickards (1888), 4 T. L. R. 622; The Lutzow (Egypt, 1915), 1 Br. & Col. P. C. 528; but *contra,* Mather v. Cunningham (1909), 105 Maine, 326. The American decision is more in harmony with the opinion and conditions of the present day. Domicile does not necessarily either confer or forfeit citizenship, although in fact it is usually a prerequisite to naturalization, and its acquisition in another country may be made the ground for forfeiture of citizenship.

As to commercial domicile as distinguished from civil or personal domicile, see the note, *post,* p. 230.

Whether a state may punish an offense against its laws which was committed abroad has been the subject of many controversies, the most famous of which was the Cutting Case. Cutting, an American citizen, had published in Texas a newspaper article reflecting on a citizen of Mexico. When Cutting happened to be in Mexico, the victim of his attack sued him for libel and procured his arrest. The American government argued that whatever offense had been committed had occurred in Texas, while the Mexican government claimed jurisdiction over all offenses against its citizens wherever committed. The plaintiff having discontinued his suit, Cutting was released. See Professor John Bassett Moore's comprehensive *Report on Extraterritorial Crime*—the best discussion of the subject. See also McLeod

v. Attorney-General of New South Wales (1891), Appeal Cases, 455; Rex v. Lynch (1903), 1 K. B. 444; and Moore, *Digest*, II, 225.

As to the jurisdiction of a state over leased territory, see *International Law Situations, 1902*, 28.

Section 2. Jurisdiction over Boundary Rivers.

LOUISIANA v. MISSISSIPPI.

Supreme Court of the United States. 1906.
202 U. S. 1.

Original. In equity.

The State of Louisiana by leave of court filed her bill against the State of Mississippi, October 27, 1902, to obtain a decree determining a boundary line between the two States and requiring the State of Mississippi to recognize and observe the line so determined. . . .

Mr. Chief Justice Fuller . . . delivered the opinion of the court. . . .

The State of Louisiana was admitted into the Union by the act of Congress approved April 6, 1812, 2 Stat. 701, c. 50, which commenced as follows:

"Whereas, the representatives of the people of all that part of the territory or country ceded under the name of 'Louisiana' by the treaty at Paris on the thirtieth day of April, one thousand eight hundred and three, between the United States and France, contained within the following limits, that is to say: Beginning at the mouth of the river Sabine; thence, by a line to be drawn along the middle of said river, including all islands, to the thirty-second degree of latitude; thence due north to the northernmost part of the thirty-third degree of north latitude; thence, down the said parallel of latitude to the river Mississippi; thence, down the said river, to the river Iberville; and from thence, along the middle of the said river, and Lakes Maurepas and Pontchartrain, to the Gulf of Mexico; thence, bounded by the said Gulf, to the place of beginning, including all islands within three leagues of the coast;" . . .

If the doctrine of the thalweg is applicable, the correct boundary line separating Louisiana from Mississippi in these waters is the deep water channel.

The term "thalweg" is commonly used by writers on inter-

national law in definition of water boundaries between States, meaning the middle or deepest or most navigable channel. And while often styled "fairway" or "midway" or "main channel," the word itself has been taken over into various languages. Thus in the treaty of Luneville, February 9, 1801, we find "le Thalweg de l'Adige," "le Thalweg du Rhin," and it is similarly used in English treaties and decisions, and the books of publicists in every tongue.

In Iowa v. Illinois, 147 U. S. 1, the rule of the thalweg was stated and applied. The controversy between the States of Iowa and Illinois on the Mississippi river, which flowed between them, was as to the line which separated "the jurisdiction of the two States for the purposes of taxation and other purposes of government." Iowa contended that the boundary line was the middle of the main body of the river, without regard to the "steamboat channel" or deepest part of the stream. Illinois claimed that its jurisdiction extended to the channel upon which commerce on the river by steamboats or other vessels was usually conducted. This court held that the true line in a navigable river between States is the middle of the main channel of the river.

Mr. Justice Field, delivering the opinion of the court, said:

"When a navigable river constitutes the boundary between two independent States, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each State in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is, therefore, laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining States up to which each State will on its side exercise jurisdiction. In international law, therefore, and by the usage of European nations, the term 'middle of the stream,' as applied to a navigable river, is the same as the middle of the channel of such stream, and in that sense the terms are used in the treaty of peace between Great Britain, France, and Spain, concluded at Paris in 1763. By the language, 'a line drawn along the middle of the river Mississippi from its source to the river Iberville,' as there used, is meant along the middle of the channel of the river Mississippi."

This judgment related to navigable rivers. But we are of opinion that, on occasion, the principle of the thalweg is applic-

able, in respect of water boundaries, to sounds, bays, straits, gulfs, estuaries and other arms of the sea.

As to boundary lakes and landlocked seas, where there is no necessary track of navigation, the line of demarcation is drawn in the middle, and this is true of narrow straits separating the lands of two different States; but whenever there is a deep water sailing channel therein, it is thought by the publicists that the rule of the thalweg applies. 1 Martens (F. de), 2d ed. 134; Hall, sec. 38; Bluntschli, 5th ed. secs. 298, 299; 1 Oppenheim, 254, 255.

Thus Martens writes: "What we have said in regard to rivers and lakes is equally applicable to the straits or gulfs of the sea, especially those which do not exceed the ordinary width of rivers or double the distance that a cannon can carry."

So Pradier Fodéré says (Vol. 11, p. 202), that as to lakes, "in communication with or connected with the sea, they ought to be considered under the same rules as international rivers."

The same view is confirmed by decisions of this court and of many arbitral tribunals.

In Devoe Manufacturing Company, 108 U. S. 401, the question at issue was in regard to the boundary line between New York and New Jersey under an agreement between the two States. The jurisdiction of the State of New Jersey was claimed "to extend down to the bay of New York, and to the channel midway of said bay," and this court sustained the claim. See Hamburg American Steamship Company v. Grube, 196 U. S. 407.

In the San Juan Water Boundary controversy between the United States and Great Britain, Emperor William I gave the award in favor of the United States, October 21, 1871, by deciding "that the boundary line between the territory of Her Brittanic Majesty and the United States should be drawn through the Haro Channel;" and it is apparent that the decision was based on the deep channel theory as applicable to sounds and arms of the sea, such as the straits of San Juan de Fuca; indeed in a subsequent definition of the boundary, signed by the Secretary of State, the British Minister, and the British representative, the boundary line was said to be prolonged until it "reaches the center of the fairway of the Straits of San Juan de Fuca." The fairway was the equivalent of the thalweg.

Again, in fixing the boundary line of the Detroit river, under the sixth and seventh articles of the treaty of Ghent, the deep water channel was adopted, giving Belle Isle to the United States as lying north of that channel.

So in the Alaskan Boundary case, the majority of the arbitration tribunal, made up of Baron Alverstone, Lord Chief Justice of England, Mr. Secretary Root, and Senators Lodge and Turner, held that the middle of the Portland Channel was the proper boundary line and included Wales Island, to the north of which the channel passed. This sustained the American contention in regard to the thalweg and the island lying south of it. . . .

In such circumstances as exist in the present case, we perceive no reason for declining to apply the rule of the thalweg in determining the boundary. . . .

Our conclusion is that complainant is entitled to the relief sought.

Decree accordingly.

NOTE.—Accord: Handly's Lessee v. Anthony (1820), 5 Wheaton, 374; Howard v. Ingersoll (1852), 13 Howard, 381; Jones v. Soulard (1861), 24 Howard, 41; Indiana v. Kentucky (1890) 136 U. S. 479; Keokuk & Hamilton Bridge Co. v. Illinois (1900), 175 U. S. 626; Morgan v. Reading (1844), 3 Sm. & Marsh (Miss.), 366; St. Joseph & G. I. Ry. v. Devereaux (1889), 41 Fed. 14. There is a full citation of authorities in the brief of complainant's counsel in the principal case, 202 U. S. 25. See also Moore, *Digest*, I, 616; Bonfils (Fauchille), 328.

Should accretion, erosion or other natural causes produce gradual and imperceptible changes in the main channel of a stream, the boundary line shifts accordingly, New Orleans v. United States (1836), 10 Peters, 662, 717; Nebraska v. Iowa (1892), 143 U. S. 359; Philadelphia Company v. Stimson (1912), 223 U. S. 605, 625; McBaine v. Johnson (1900), 155 Missouri, 191; Buttenuth v. St. Louis Bridge Co. (1888), 123 Illinois 535; Bellefontaine Improvement Co. v. Niedringhaus (1899), 181 Illinois, 426; but if the change is sudden the boundary continues where it was, Cooley v. Golden (1893), 52 Mo. App. 229; Missouri v. Nebraska (1904), 196 U. S. 23. As to the consequences following the recession of a lake, see Murry v. Sermon (1820), 1 Hawks (N. C.), 56. The development of a new and more important channel, the first one still continuing in its old location, does not affect the boundary, Washington v. Oregon (1908), 211 U. S. 127, same case on re-hearing, (1909), 214 U. S. 205. If an island should be formed suddenly in a river, the riparian sovereigns might fairly claim an equal division thereof, but if formed gradually it is the property of the state in whose waters it lies, St. Louis v. Rutz (1891), 138 U. S. 226. When a river forms a boundary between two countries and the only access to adjacent territories is through that river, the waters of the whole must be considered as common to both nations for all purposes of navigation as a common highway, The Twee Gebroeders (1800), 3 C. Robinson, 336; The Apollon (1824), 9 Wheaton, 362. The same principle applies to lakes which are boundaries, United States v. Rodgers (1893), 150 U. S. 249.

SECTION 3. JURISDICTION OVER MARGINAL SEAS.

THE ANNA.

HIGH COURT OF ADMIRALTY OF GREAT BRITAIN. 1805.
5 C. Robinson, 373.

This was the case of a ship under American colors, with a cargo of logwood, and about 13,000 dollars on board, bound from the Spanish main to New Orleans, and captured by the Minerva privateer near the mouth of the River Mississippi. A claim was given under the direction of the American Ambassador [Minister] for the ship and cargo, "as taken within the territory of the United States, at the distance of a mile and a half from the western shore of the principal entrance of the Mississippi, and within view of a post protected by a gun, and where is stationed an officer of the United States." . . .

SIR WILLIAM SCOTT [LORD STOWELL]: . . .

When the ship was brought into this country a claim was given of a grave nature, alledging a violation of the territory of the United States of America. This great leading fact has very properly been made a matter of much discussion, and charts have been laid before the Court to show the place of capture, though with different representations from the adverse parties. The capture was made, it seems, at the mouth of the River Mississippi, and, as it is contended in the claim, within the boundaries of the United States. We all know that the rule of law on this subject is "*terræ dominium finitur, ubi finitur armorum vis,*" and since the introduction of fire-arms that distance has usually been recognized to be about three miles from the shore. But it so happens in this case, that a question arises as to what is to be deemed the shore, since there are a number of little mud islands composed of earth and trees drifted down by the River, which form a kind of portico to the main-land. It is contended that these are not to be considered as any part of the territory of America, that they are a sort of "no man's land," not of consistency enough to support the purposes of life, uninhabited, and resorted to, only, for shooting and taking birds nests. It is argued that the line of territory is to be taken only from the Balise, which is a fort raised on made land by the former Spanish possessors. I am of a different opinion; I think that the protection of territory is to be reckoned from these islands; and that they are the natural appendages of the coast

on which they border, and from which, indeed, they are formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law, *Quod vis fluminis de tuo prædio detraxerit, & vicino prædio attulerit, palam tuum remanet,* (Inst. L. 2. Tit. 1, 921), even if it had been carried over to an adjoining territory. Consider what the consequence would be if lands of this description were not considered as appendent to the mainland, and as comprised within the bounds of territory. If they do not belong to the United States of America, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America! It is physically possible at least that they might be so occupied by European nations, and then the command of the River would be no longer in America, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to shew that these islands are not to be considered as part of the territory of America. Whether they are composed of earth or solid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.

I am of opinion that the right of territory is to be reckoned from those islands. That being established, it is not denied that the actual capture took place within the distance of three miles from the islands, and at the very threshold of the river. But it is said that the act of capture is to be carried back to the commencement of the pursuit, and that if a contest begins before, it is lawful for a belligerent cruiser to follow, and to seize his prize within the territory of a neutral State. And the authority of Bynkershoek is cited on this point. True it is, that that great man does intimate an opinion of his own to that effect; but with many qualifications, and as an opinion, which he did not find to have been adopted by any other writers. I confess I should have been inclined to have gone along with him, to this extent, that if a cruiser, which had before acted in a manner entirely unexceptionable, and free from all violation of territory, had summoned a vessel to submit to examination and search, and that vessel had fled to such places as these, entirely uninhabited, and the cruiser had without injury or annoyance to any person whatever, quietly taken possession of his prey, it would be stretching the point too hardly against the captor, to say that on this account only it should be held an illegal capture. If nothing objectionable had appeared in the conduct of the captors before, the mere follow-

ing to such a place as this is, would, I think, not invalidate a seizure otherwise just and lawful.

But that brings me to a part of the case, on which I am of opinion that the privateer has laid herself open to great reprehension. Captors must understand that they are not to station themselves in the mouth of a neutral River, for the purpose of exercising the rights of war from that River, much less in the River itself. It appears from the Privateer's own log-book that this vessel has done both; and as to any attempt to shelter this conduct under the example of King's ships, which I do not believe, and which, if true, would be no justification to others, captors must I say be admonished, that the practice is altogether indefensible, and that if King's ships should be guilty of such misconduct, they would be as much subject to censure as other cruisers. It is unnecessary to go over all the entries in the log. The captors appear by their own description *to have been standing off and on,* obtaining information at the Balise, overhauling vessels in their course down the River, and making the River as much subservient to the purposes of war, as if it had been a river of their own country. This is an inconvenience which the States of America are called upon to resist, and which this Court is bound on every principle to discourage and correct. . . .

The conduct of the captors has on all points been highly reprehensible. Looking to all the circumstances of previous misconduct, I feel myself bound to pronounce, that there has been a violation of territory, and that as to the question of property, there was not sufficient ground of seizure; and that these acts of misconduct have been further aggravated, by bringing the vessel to England, without any necessity that can justify such a measure. In such a case it would be falling short of the justice due to the violated rights of America, and to the individuals who have sustained injury by such misconduct, if I did not follow up the restitution which has passed on the former day, with a decree of costs and damages.

NOTE.—It was a principle of the Roman law that the seas are free and incapable of appropriation. The Mediterranean, however—the only sea which was of much importance to the Romans—came ultimately to be surrounded by Roman territory and was dominated by Roman fleets. Until comparatively recent times, pirates were a serious danger to maritime commerce, and for their suppression, as well as for other reasons, the states which succeeded the Roman empire asserted jurisdiction not only over their marginal waters but over vast areas of the high seas. Venice claimed jurisdiction over the whole of the upper Adriatic and her claim to exact toll from vessels navigating therein was defended by the famous Paul Sarpi.

The King of Denmark and Norway claimed the Sound and all the waters lying between Denmark and Iceland. The pretensions of both Venice and Denmark were based on the fact that they controlled the opposite shores and hence should control the intervening waters. More extravagant than any of these claims were those put forward by Spain and Portugal who in the sixteenth century divided the great oceans between them,—Spain taking under her exclusive jurisdiction the western portion of the Atlantic, the Gulf of Mexico, and the Pacific, while Portugal asserted similar authority in the eastern portion of the Atlantic south of Morocco and in the Indian Ocean. Such absurd claims inevitably provoked protest, and England was in a favorable position to oppose them, for, prior to the accession of James I in 1603, she had never asserted for herself any exclusive rights over any but adjacent waters. Even when Henry V, after the conquest of France and the recognition of himself as the heir to the French Crown, was urged by Parliament to levy tribute on all foreign ships in the English Channel, he refused. Hence when the Spanish Ambassador came to protest against Sir Francis Drake's plundering of Spanish merchantmen on the coast of South America, the reply of Queen Elizabeth was a statement both of the practice of her predecessors as well as of the doctrine which now prevails. She said:

> All are at liberty to navigate that vast ocean, since the use of the sea and the air is common to all. No nation or private person can have any title to the ocean, for neither the course of nature nor public usage permits any occupation of it.
>
> Camden, *Annales Rerum Anglicarum*, 309.

The doctrine here stated was the basis of Grotius' well-known essay *Mare Liberum*, which was published in 1609. This in turn provoked John Selden to write *Mare Clausum*, not published, however, until 1635, which is the classic exposition of the doctrine that the high seas can be appropriated. Grotius recognized that a state has a right to control the sea adjacent to its coasts, but the distance to which that control might extend was first precisely formulated by his fellow-countryman Bynkershoek, who said in 1702, "We do not concede dominion of an adjacent sea further than that distance from the land from which it can be ruled." In other words, a state's control over the adjacent seas extends to the range of a cannon. This idea he embodied in a phrase which has become almost an aphorism, —*Terrae dominium finitur ubi finitur armorum vis.* The first government which adopted this as a rule of international law seems to have been that of the United States, which in the administration of President Washington asserted that the dominion of this country extended one marine league from the shore. Moore, *Digest*, I, 702. This, however, seems to have been set up as a minimum claim. In 1804, Thomas Jefferson, who, as Washington's Secretary of State, had asserted the three-mile rule, said that the three-mile maritime jurisdiction should be counted from the farthest point that could be seen from land. He estimated that this point was about 25 miles distant. This rule, if applied, would give the United States jurisdiction over the marginal seas for a distance of 28 miles. In 1805 Jefferson went still further and claimed that the Gulf Stream was the natural boundary of the United States. At about the same time, the three-mile limit was recognized by Lord Stowell in The Twee Gebroeders

(1800), 3 C. Robinson, 162, and The Anna (1805), 5 Ib. 373, and by Justice Story in The Ann (1812), 1 Gallison, 62. See also United States v. Grush (1829), 5 Mason, 290, 300, and Dunham v. Lamphere (1855), 3 Gray (Mass.), 268, 270. Logically the principle upon which the extent of a state's maritime jurisdiction was measured required that such jurisdiction should be increased automatically as the range of cannon increased, and there have not been wanting jurists, e. g., Professor de Martens, who have so argued. But the practice of nations has not been logical, and three miles or a marine league still remains the recognized minimum limit of a state's jurisdiction over the high seas. Some nations claim more. Norway and Sweden assert jurisdiction up to four miles from their coasts, and Spain up to six miles, while Italy makes the distance ten miles. In this divergence of practice, the most definite statement that can be made is that a nation's right to assert its jurisdiction as far as three miles from its shore is unquestioned. There is general recognition of the desirability of extending the width of this maritime belt, but as yet no agreement has been reached. This subject is admirably treated by Professor George G. Wilson in *International Law Topics, 1913*, 11.

The jurisdiction of a state over its marginal waters is elaborately discussed in The Queen v. Keyn (1876), L. R. 2 Exchcq. Div. 63, in which it was held that an English court had no jurisdiction over a crime committed by a foreigner on a foreign merchant ship within three miles of the British coast. This decision has been strongly criticised and the jurisdiction which it denied was promptly conferred by act of Parliament, the preamble of which declared:

> Whereas the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defense and security of such dominions, etc.

It will be noted that the principle here enunciated, the soundness of which is unquestionable, does not restrict the Crown's jurisdiction to the three-mile zone but asserts it "to such a distance as is necessary for the defense and security" of its dominions. On the whole subject see Fulton, *The Sovereignty of the Sea*,—a scholarly and well-written book,—and Bonfils (Fauchille), 304.

MORTENSEN v. PETERS.

HIGH COURT OF JUSTICIARY OF SCOTLAND. 1906.
14 Scots Law Times Reports, 227.

[The facts and the first part of the opinion are printed, *ante*, p. 16.]

THE LORD JUSTICE GENERAL. . . . I do not think I need say anything about what is known as the three-mile limit. It

may be assumed that within the three miles the territorial sovereignty would be sufficient to cover any such legislation as the present. It is enough to say that that is not a proof of the counter proposition that outside the three miles no such result could be looked for. The locus, although outside the three-mile limit, is within the bay known as the Moray Firth, and the Moray Firth, says the respondent, is *intra fauces terrae.* Now, I cannot say that there is any definition of what *fauces terrae* exactly are. But there are at least three points which go far to shew that this spot might be considered as lying therein.

1st. The dicta of the Scottish Institutional Writers seem to show that it would be no usurpation, according to the law of Scotland, so to consider it.

Thus, Stair, II. i. 5: "The vast ocean is common to all mankind as to navigation and fishing, which are the only uses thereof, because it is not capable of bounds; but when the sea is inclosed in bays, creeks, *or otherwise is capable of any bounds or meiths as within the points of such lands,* or within the view of such shores, then it may become proper, but with the reservation of passages for commerce as in the land." And Bell, Pr. Sec. 639: "The Sovereign . . . is proprietor of the narrow seas within cannon shot of the land, and the *firths,* gulfs, and bays around the Kingdom."

2nd. The same statute puts forward claims to what are at least analogous places. If attention is paid to the Schedule appended to section 6, many places will be found far beyond the three-mile limit—e. g., the Firth of Clyde near its mouth. I am not ignoring that it may be said that this in one sense is proving *idem per idem,* but none the less I do not think the fact can be ignored.

3rd. There are many instances to be found in decided cases where the right of a nation to legislate for waters more or less landlocked or landembraced, although beyond the three-mile limit, has been admitted. . . .

It seems to me therefore, without laying down the proposition that the Moray Firth is for every purpose within the territorial sovereignty, it can at least be clearly said that the appellant cannot make out his proposition that it is inconceivable that the British legislature should attempt for fishery regulation to legislate against all and sundry in such a place. And if that is so, then I revert to the considerations already stated which as a matter of construction make me think that it did so legislate. . . .

NOTE.—In several instances nations have asserted jurisdiction over bays or arms of the high seas having openings more than six miles in width. Thus the United States claims the Delaware Bay, which is fifteen miles wide at the entrance, The Grange (1793), 1 *Opinions Att. Gen.* 32, Moore, *Digest,* I, 735, and the Chesapeake Bay, which is twelve miles wide at the entrance, The Alleganean (1885), Moore, *Int. Arb.* IV, 4333, V, 4675, Scott, *Cases,* 143. In Direct United States Cable Co. v. Anglo-American Telegraph Co. (1877), L. R. 2 App. Cases, 394, it was held that the Bay of Conception, about twenty miles in width at the entrance, was under the jurisdiction of Newfoundland. In the case of all of these bays, the claim to jurisdiction is based largely on long-continued acquiescence on the part of other nations. See also Regina v. Cunningham (1859), Bell, *Crown Cases,* 72 (Bristol Channel), Manchester v. Massachusetts (1891), 139 U. S. 240 (Buzzards Bay), and Mahler v. Norwich & N. Y. Transportation Co. (1866), 35 N. Y. 352 (Long Island Sound). In the case of The Washington (1853), Moore, *Int. Arb.* IV, 4342, the Bay of Fundy, 65 to 75 miles in width, was held to be part of the high seas, and in the case of The Argus (1854), Ib. IV, 4344, the headland theory was rejected when Great Britain sought to apply it to Cape Breton Island. In the Behring Sea Controversy, which was submitted to arbitration in 1893, the United States contended that the Behring Sea was a closed sea under the exclusive jurisdiction of the United States. In the opinion of a distinguished scholar this was "a new effort made by a great power, under special conditions, and at the instance of a powerful corporation, to challenge the freedom of the open sea." Cobbett, *Cases and Opinions,* I, 130. The contention of the United States was not sustained by the arbitrators. See Moore, *Int. Arb.* I, 755.

In the North Atlantic Coast Fisheries Arbitration in 1910, one of the points at issue between Great Britain and the United States was the interpretation of a clause of the treaty of 1818 by which the United States gave up any former rights of its citizens to engage in the fishing industry "in or within three marine miles of any of the coast bays, creeks, or harbours of Her Britannic Majesty's dominions in North America" not included in certain limits. The United States contended that the above described line should be measured from the shore and should follow its indentations. Great Britain relied upon the headlands doctrine and argued that the line should be measured from headland to headland. The Hague Tribunal, one judge dissenting, sustained the British contention and said:

> Admittedly the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. These conditions of national and territorial integrity, of defence, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally, in proportion to the penetration inland of the bay; but as no principle of international law recognizes any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty, this Tribunal is unable to qualify by the application of any new principle its interpretation of the Treaty of 1818 as excluding bays in general from the strict and systematic application of the three mile rule.

On this case see Robert Lansing, "The North Atlantic Coast Fisheries Arbitration," in *Am. Jour. Int. Law*, V, 1; same title by E. M. Borchard in *Col. Law Rev.* XI, 1. The text of the award and other documents are in Wilson, *The Hague Arbitration Cases*, 134, and in Scott, *The Hague Court Reports*, 141. See also *Argument of the Honorable Elihu Root on Behalf of the United States*, with an introduction by J. B. Scott giving an excellent account of the entire controversy. On the whole question of jurisdiction over bays see "Territorial Waters" by Sir Thomas Barclay in *Twenty Seventh Report of the International Law Association*, 81, and the exceptionally valuable papers by A. H. Charteris on "Recent International Disputes Regarding International Bays," Ib. 107, and on "Territorial Jurisdiction in Wide Bays," Ib. *Twenty Third Report*, 103.

Section 4. Jurisdiction on the High Seas.

CHURCH v. HUBBART.

Supreme Court of the United States. 1804.
2 Cranch, 187.

Error to the Circuit Court for the District of Massachusetts.

[This was an action on two policies of insurance on the cargo of the ship Aurora bound from New York to Portuguese ports on the coast of Brazil. While lying four or five leagues from land off the mouth of the river Para, the ship was seized by Portuguese authorities for attempting to trade with the Portuguese colony of Brazil contrary to the law which restricted such trade to Portuguese subjects. The defendant argued that it was relieved of liability by clauses in each policy which provided that the insurers should not be liable for seizure by the Portuguese for illicit trade. The plaintiff argued that the seizure was illegal since it was made on the high seas.]

Marshall, Ch. J. delivered the opinion of the court. . . .

In this case the unlawfulness of the voyage was perfectly understood by both parties. That the crown of Portugal excluded, with the most jealous watchfulness, the commercial intercourse of foreigners with their colonies, was, probably, a fact of as much notoriety as that foreigners had devised means to elude this watchfulness, and to carry on a gainful but very hazardous trade with those colonies. If the attempt should succeed it would be very profitable, but the risk attending it was necessarily great. It was this risk which the underwriters

. . . did not mean to take upon themselves. . . . Whenever the risk commences, the exception commences also, for it is apparent that the underwriters meant to take upon themselves no portion of that hazard which was occasioned by the unlawfulness of the voyage. If it could have been presumed by the parties to this contract, that the laws of Portugal, prohibiting commercial intercourse between their colonies and foreign merchants, permitted vessels to enter their ports, or to hover off their coasts for the purposes of trade, with impunity, and only subjected them to seizure and condemnation after the very act had been committed, or if such are really their laws, then indeed the exception might reasonably be supposed to have been intended to be as limited in its construction as is contended for by the plaintiff. . . . But this presumption is too extravagant to have been made. . . . As a general principle, the nation which prohibits commercial intercourse with its colonies must be supposed to adopt measures to make that prohibition effectual. They must, therefore, be supposed to seize vessels coming into their harbors or hovering on their coasts in a condition to trade. . . .

That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the Aurora, and that this seizure is, on that account, a mere marine trespass, not within the exception, cannot be admitted. To reason from the extent of protection a nation will afford to foreigners to the extent of the means it may use for its own security does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory. Upon this principle the right of a belligerent to search a neutral vessel on the high seas for contraband of war is universally admitted, because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy: so too a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right, is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unneces-

sarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.

In different seas, and on different coasts, a wider or more contracted range, in which to exercise the vigilance of the government, will be assented to. Thus in the channel where a very great part of the commerce to and from all the north of Europe, passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the government may be extended somewhat further; and foreign nations submit to such regulations as are reasonable in themselves, and are really necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions. . . .

Indeed, the right given to our own revenue cutters, to visit vessels four leagues from our coast, is a declaration that in the opinion of the American government, no such principle as that contended for, has a real existence.

NOTE.—The doctrine of Church v. Hubbart has been subjected to severe criticism. See especially Wheaton (Dana), note 108. But the case has the weighty support of Lord Stowell in Le Louis (1817), 2 Dodson, 210, and of Chief Justice Cockburn in The Queen v. Keyn (1876), L. R. 2 Ex. Div. 63, 214. "Higher judicial authority to support a principle of international law could not be found." Piggott, *Nationality*, II, 49. See also Rose v. Himely (1808), 4 Cranch, 241; Hudson v. Guestier (1810), 6 Ib. 281; The Apollon (1824), 9 Wheaton, 362; In re Cooper (1892), 143 U. S. 472; Cucullu v. Louisiana Insurance Co. (1827), 5 Martin, N. S. (La.) 464; United States v. Swan (1892), 50 Fed. 108; United States v. The Kodiak (1892), 53 Fed. 126; The Alexander (1894), 60 Fed. 914. Sir Travers Twiss, in *The Law of Nations Considered as Independent Political Communities*, sec. 190, Sir Robert Phillimore in *Commentaries*, I, 276, Westlake, I, 175, and Pitt Cobbett, *Cases and Opinions*, I, 140, deny that any such right is admitted in international law, although they concede that nations may through comity acquiesce in its exercise. But Oppenheim, I, 261, holds that long continued practice unopposed by the nations concerned has resulted in the incorporation of the principle in the body of international law. This seems a sound view. If the right to adopt defensive measures beyond a country's own jurisdiction be admitted at all, and the discussion provoked by such cases as the destruction of the Caroline in American waters by British forces in 1837 and the seizure of the Virginius on the high seas by Spain in 1873 shows that it is admitted, the legitimacy of such mild preventive measures as that involved in Church v. Hubbart should not be questioned. For an extended discussion of the British Hovering Acts, see

Piggott, *Nationality,* II, 40-60. For the French practice, see Mérignhac, *Traité de Droit International,* II, 387. For the American practice see Moore, *Digest,* I, 725.

A situation which well exemplified the principles laid down in Church v. Hubbart arose in 1864 when the Kearsarge appeared off Cherbourg, France, in pursuit of the Alabama, then lying in that harbor. When a battle was seen to be impending which might take place just beyond the three-mile limit, the French Minister of Foreign Affairs protested to the American Minister in this statement:

> That a sea fight would thus be got up in the face of France, and at a distance from their coast within reach of the guns used on shipboard in these days. That the distance to which the neutral right of an adjoining government extended itself from the coast was unsettled, and that the reason of the old rules, which assumed that three miles was the outermost limit of a cannon shot, no longer existed, and that, in a word, a fight on or about such a distance would be offensive to the dignity of France and they would not permit it.

The American Minister replied that the three-mile rule was the only recognized rule, and in this stand he was supported by Secretary Seward. The protest of the French Government seems, however, to have been entirely reasonable, and had any shots from the Kearsarge caused damage on the adjacent coast the United States would have been responsible. In fact, the fighting began when the two vessels were about seven miles out, and the Alabama sank when about five miles from land. See Moore, *Digest,* I, 722.

It is admitted that an offending vessel may be pursued beyond a state's territorial limits and taken upon the high seas, provided the pursuit be instant and continuous, The King v. The Ship North (1905), 11 Exchequer Court of Canada, 141. See also *Annuaire de l'Institut de Droit International* (1894-95), XIII, 329. Such pursuit, however, may not be prosecuted into the territorial waters of another state, The Itata (1892), Moore, *Int. Arb.* III, 3067, 3070.

THE MARIANNA FLORA.

SUPREME COURT OF THE UNITED STATES. 1826.
11 Wheaton, 1.

Appeal from the Circuit Court of the United States for Massachusetts.

[In 1821 the American armed schooner Alligator, Lieutenant Stockton commanding, while on a cruise in the Atlantic against pirates and slave-traders, met the Portuguese ship Marianna Flora. When within long shot, the latter opened fire upon the Alligator, and continued firing until within musket range, when

a broadside from the Alligator silenced her. Not until that time did the Marianna Flora hoist her national flag, although the Alligator had hoisted her flag immediately upon the firing of the first shot. The Portuguese master explained his conduct by saying that he thought the Alligator was a piratical cruiser. Lieutenant Stockton took possession of the vessel and sent it to Boston where it was libelled for an alleged piratical aggression attempted or committed against the Alligator. The District Court decreed restitution of the vessel and damages for detention. Pending appeal to the Circuit Court, the ship was voluntarily restored, and the decree as to damages was then reversed. From this an appeal was taken to the Supreme Court.]

Mr. Justice Story delivered the opinion of the court. . . .

In the present posture of this cause, the libellants are no longer plaintiffs. The claimants interpose for damages in their turn, and have assumed the character of actors. They contend that they are entitled to damages, first, because the conduct of Lieutenant Stockton, in the approach and seizure of the Marianna Flora, was unjustifiable; and, secondly, because, at all events, the subsequent sending her in for adjudication was without any reasonable cause.

In considering these points, it is necessary to ascertain what are the rights and duties of armed, and other ships, navigating the ocean in time of peace. It is admitted, that the right of visitation and search does not, under such circumstances, belong to the public ships of any nation. This right is strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions. It is true, that it has been held in the Courts of this country, that American ships, offending against our laws, and foreign ships, in like manner, offending within our jurisdiction, may, afterwards, be pursued and seized upon the ocean, and rightfully brought into our ports for adjudication. This, however, has never been supposed to draw after it any right of visitation or search. The party, in such case, seizes at his peril. If he establishes the forfeiture, he is justified. If he fails, he must make full compensation in damages.

Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business without interruption; but, whatever may be that business, she is

bound to pursue it in such a manner as not to violate the rights of others. The general maxim in such cases is, *sic utere tuo, ut non alienum lædas.*

It has been argued, that no ship has a right to approach another at sea; and that every ship has a right to draw round her a line of jurisdiction, within which no other is at liberty to intrude. In short, that she may appropriate so much of the ocean as she may deem necessary for her protection, and prevent any nearer approach.

This doctrine appears to us novel, and is not supported by any authority. It goes to establish upon the ocean a territorial jurisdiction, like that which is claimed by all nations within cannon-shot of their shores, in virtue of their general sovereignty. But the latter right is founded upon the principle of sovereign and permanent appropriation, and has never been successfully asserted beyond it. Every vessel undoubtedly has a right to the use of so much of the ocean as she occupies, and as is essential to her own movements. Beyond this, no exclusive right has ever yet been recognized, and we see no reason for admitting its existence. Merchant ships are in the constant habit of approaching each other on the ocean, either to relieve their own distress, to procure information, or to ascertain the character of strangers; and, hitherto, there has never been supposed in such conduct any breach of the customary observances, or of the strictest principles of the law of nations. In respect to ships of war sailing, as in the present case, under the authority of their government, to arrest pirates, and other public offenders, there is no reason why they may not approach any vessels descried at sea, for the purpose of ascertaining their real characters. Such a right seems indispensable for the fair and discreet exercise of their authority; and the use of it cannot be justly deemed indicative of any design to insult or injure those they approach, or to impede them in their lawful commerce. On the other hand, it is as clear, that no ship is, under such circumstances, bound to lie by, or wait the approach of any other ship. She is at full liberty to pursue her voyage in her own way, and to use all necessary precautions to avoid any suspected sinister enterprise or hostile attack. She has a right to consult her own safety; but, at the same time, she must take care not to violate the rights of others. She may use any precautions dictated by the prudence or fears of her officers; either as to delay, or the progress or course of her voyage; but she is not at liberty to inflict injuries upon other innocent parties, simply because of conjectural dan-

gers. These principles seem to us the natural result of the common duties and rights of nations navigating the ocean in time of peace. Such a state of things carries with it very different obligations and responsibilities from those which belong to public war, and is not to be confounded with it.

The first inquiry, then, is, whether the conduct of Lieutenant Stockton was, under all the circumstances preceding and attending the combat, justifiable. There is no pretence to say that he committed the first aggression. That, beyond all question, was on the part of the Marianna Flora; and her firing was persisted in after the Alligator had hoisted her national flag, and, of course, held out a signal of her real pacific character. What, then, is the excuse for this hostile attack? Was it occasioned by any default or misconduct on the part of the Alligator? It is said, that the Alligator had no right to approach the Marianna Flora, and that the mere fact of approach authorized the attack. This is what the court feels itself bound to deny. Lieutenant Stockton, with a view to the objects of his cruise, had just as unquestionable a right to use the ocean, as the Portuguese ship had; and his right of approach was just as perfect as her right of flight. But, in point of fact, Lieutenant Stockton's approach was not from mere motives of public service, but was occasioned by the acts of the Marianna Flora. He was steering on a course which must, in a short time, have carried him far away from her. She lay to, and showed a signal ordinarily indicative of distress. It was so understood, and, from motives of humanity, the course was changed, in order to afford the necessary relief. There is not a pretence in the whole evidence, that the lying to was not voluntary, and was not an invitation of some sort. The whole reasoning on the part of the claimants is, that it was for the purpose of meeting a supposed enemy by daylight, and, in this way, to avoid the difficulties of an engagement in the night. But how was this to be known on board of the Alligator? How was it to be known that she was a Portuguese ship, or that she took the Alligator for a pirate, or that her object in laying to was a defensive operation? When the vessels were within reach of each other, the first salutation from the ship was a shot fired ahead, and, at the same time, no national flag appeared at the mast-head. The ship was armed, appeared full of men, and, from her manœuvres, almost necessarily led to the supposition, that her previous conduct was a decoy, and that she was either a piratical vessel, or, at least, in possession of pirates. Under such circumstances, with hostilities already proclaimed, Lieutenant

Stockton was certainly not bound to retreat; and, upon his advance, other guns, loaded with shot, were fired, for the express purpose of destruction. It was, then, a case of open, meditated hostility, and this, too, without any national flag displayed by the Portuguese ship, which might tend to correct the error, for she never hoisted her flag until the surrender. What, then, was Lieutenant Stockton's duty? In our view it was plain; it was to oppose force to force, to attack and to subdue the vessel thus prosecuting unauthorized warfare upon his schooner and crew. In taking, therefore, the readiest means to accomplish the object, he acted, in our opinion, with entire legal propriety. He was not bound to fly, or to wait until he was crippled. His was not a case of mere remote danger, but of imminent, pressing, and present danger. He had the flag of his country to maintain, and the rights of his cruiser to vindicate. To have hesitated in what his duty to his government called for on such an occasion would have been to betray (what no honorable officer could be supposed to indulge) an indifference to its dignity and sovereignty.

But, it is argued, that Lieutenant Stockton was bound to have affirmed his national flag by an appropriate gun; that this is a customary observance at sea, and is universally understood as indispensable to prevent mistakes and misadventures; and that the omission was such a default on his part, as places him *in delicto* as to all the subsequent transactions. This imputation certainly comes with no extraordinary grace from the party by whom it is now asserted. If such an observance be usual and necessary, why was it not complied with on the part of the Marianna Flora? Her commander asserts, that by the laws of his own country, as well as those of France and Spain, this is a known and positive obligation on all armed vessels, which they are not at liberty to disregard. Upon what ground, then, can he claim an exemption from performing it? Upon what ground can he set up as a default in another, that which he has wholly omitted to do on his own part? His own duty was clear, and pointed out; and yet he makes that a matter of complaint against the other side, which was confessedly a primary default in himself. He not only did not hoist or affirm his flag in the first instance, but repeatedly fired at his adversary with hostile intentions, without exhibiting his own national character at all. He left, therefore, according to his own view of the law, his own duty unperformed, and fortified, as against himself, the very inference, that his ship might properly be deemed, under such circumstances, a piratical cruiser.

But, we are not disposed to admit, that there exists any such universal rule or obligation of an affirming gun, as has been suggested at the bar. It may be the law of the maritime states of the European continent already alluded to, founded in their own usages or positive regulations. But, it does not hence follow, that it is binding upon all other nations. It was admitted, at the argument, that the English practice is otherwise; and, surely, as a maritime power, England deserves to be listened to with as much respect, on such a point, as any other nation. It was justly inferred, that the practice of America is conformable to that of England; and the absence of any counterproof on the record, is almost of itself decisive. Such, however, as the practice is, even among the continental nations of Europe, it is a practice adopted with reference to a state of war, rather than peace. It may be a useful precaution to prevent conflicts between neutrals, and allies, and belligerents, and even between armed ships of the same nation. But the very necessity of the precaution in time of war arises from circumstances, which do not ordinarily occur in time of general peace. Assuming, therefore, that the ceremony might be salutary and proper in periods of war, and suitable to its exigencies, it by no means follows that it is justly to be insisted on at the peril of costs and damages in peace. In any view, therefore, we do not think this omission can avail the claimants.

Again; it is argued, that there is a general obligation upon armed ships, in exercising the right of visitation and search, to keep at a distance, out of cannon shot, and to demean themselves in such a manner as not to endanger neutrals. And this objection, it is added, has been specially provided for, and enforced by the stipulations of many of our own treaties with foreign powers. It might be a decisive answer to this argument, that, here, no right of visitation and search was attempted to be exercised. Lieutenant Stockton did not claim to be a belligerent, entitled to search neutrals on the ocean. His commission was for other objects. He did not approach or subdue the Marianna Flora, in order to compel her to submit to his search, but with other motives. He took possession of her, not because she resisted the right of search, but because she attacked him in a hostile manner, without any reasonable cause or provocation.

Doubtless, the obligation of treaties is to be observed with entire good faith, and scrupulous care. But stipulations in treaties having sole reference to the exercise of the rights of belligerents in time of war, cannot, upon any reasonable principles of con-

struction, be applied to govern cases exclusively of another nature, and belonging to a state of peace. Another consideration, quite sufficient to establish that such stipulations cannot be applied in aid of the present case, is, that whatever may be our duties to other nations, we have no such treaty subsisting with Portugal. It will scarcely be pretended, that we are bound to Portugal by stipulations to which she is no party, and by which she incurs no correspondent obligation.

Upon the whole, we are of opinion, that the conduct of Lieutenant Stockton, in approaching, and ultimately, in subduing the Marianna Flora, was entirely justifiable. . . . The decree of the Circuit Court ought to be affirmed. . . .

THE BELGENLAND.

SUPREME COURT OF THE UNITED STATES. 1885.
114 U. S. 355.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This case grew out of a collision which took place on the high seas between the Norwegian barque Luna and the Belgian steamship Belgenland, by which the former was run down and sunk. Part of the crew of the Luna, including the master, were rescued by the Belgenland and brought to Philadelphia. The master immediately libelled the steamship on behalf of the owners of the Luna and her cargo, and her surviving crew, in a cause civil and maritime. . . . The District Court decided in favor of the libellant. . . . An appeal was taken to the Circuit Court. . . . A decree was thereupon entered, affirming the decree of the District Court. . . . A reargument was then had on the question of jurisdiction, and the court held and decided that the Admiralty Courts of the United States have jurisdiction of collisions occurring on the high seas between vessels owned by foreigners of different nationalities; and overruled the plea to the jurisdiction.

MR. JUSTICE BRADLEY delivered the opinion of the court. . . .

The first question to be considered is that of the jurisdiction of the District Court to hear and determine the cause.

It is unnecessary here, and would be out of place, to examine the question which has so often engaged the attention of the

common law courts, whether, and in what cases, the courts of one country should take cognizance of controversies arising in a foreign country, or in places outside of the jurisdiction of any country. . . . We shall content ourselves with inquiring what rule is followed by Courts of Admiralty in dealing with maritime causes arising between foreigners and others on the high seas.

This question is not a new one in these courts. Sir William Scott had occasion to pass upon it in 1799. An American ship was taken by the French on a voyage from Philadelphia to London, and afterwards rescued by her crew, carried to England, and libelled for salvage; and the court entertained jurisdiction. The crew, however, though engaged in the American ship, were British born subjects, and weight was given to this circumstance in the disposition of the case. The judge, however, made the following remarks: "But it is asked, if they were American seamen, would this court hold plea of their demands? It may be time enough to answer this question whenever the fact occurs. In the meantime, I will say without scruple that I can see no inconvenience that would arise if a British court of justice was to hold plea in such a case; or conversely, if American courts were to hold pleas of this nature respecting the merits of British seamen on such occasions. For salvage is a question of *jus gentium,* and materially different from the question of a mariner's contract, which is a creature of the particular institutions of the country, to be applied and construed and explained by its own particular rules. There might be good reason, therefore, for this court to decline to interfere in such cases and to remit them to their own domestic forum; but this is a general claim, upon the general ground of *quantum meruit,* to be governed by a sound discretion, acting on general principles; and I can see no reason why one country should be afraid to trust to the equity of the courts of another on such a question, of such a nature, so to be determined." The Two Friends, 1 Ch. Rob., 271, 278.

The law has become settled very much in accord with these views. That was a case of salvage; but the same principles would seem to apply to the case of destroying or injuring a ship, as to that of saving it. Both, when acted on the high seas, between persons of different nationalities, come within the domain of the general law of nations, or *communis juris,* and are *prima facie* proper subjects of inquiry in any Court of Admiralty which first

obtains jurisdiction of the rescued or offending ship at the solicitation in justice of the meritorious, or injured, parties.

The same question of jurisdiction arose in another salvage case which came before this court in 1804, Mason v. The Blaireau, 2 Cranch, 240. There a French ship was saved by a British ship, and brought into a port of the United States; and the question of jurisdiction was raised by Mr. Martin, of Maryland, who, however, did not press the point, and referred to the observations of Sir William Scott in The Two Friends. Chief Justice Marshall, speaking for the court, disposed of the question as follows:—"A doubt has been suggested," said he, "respecting the jurisdiction of the court, and upon reference to the authorities, the point does not appear to have been ever settled. These doubts seem rather founded on the idea that upon principles of general policy, this court ought not to take cognizance of a case entirely between foreigners, than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overbalance those against it, and it is the opinion of this court, that, whatever doubts may exist in a case where the jurisdiction may be objected to, there ought to be none where the parties assent to it." . . .

But, although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *communis juris*, that is, where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged. The existence of jurisdiction in all such cases is beyond dispute; the only question will be, whether it is expedient to exercise it. See 2 Parsons Ship. and Adm., 226, and cases cited in the notes. In the case of The Jerusalem, 2 Gall. 191, . . . Justice Story examined the subject very fully, and came to the conclusion that, wherever there is a maritime lien on the ship, an Admiralty Court can take jurisdiction on the principle of the civil law, that in proceedings *in rem* the proper forum is the *locus rei sitæ*. He added: "With reference, therefore, to what may be deemed the public law of Europe, a proceeding *in rem* may well be maintained in our courts where the property of a foreigner is within our jurisdiction. Nor am I able to perceive how the exercise of such judicial authority clashes with any principles of public policy." . . .

Justice Story's decision in this case was referred to by Dr. Lushington with strong approbation in the case of The Golubchick, 1 W. Rob., 143, decided in 1840, and was adopted as authority for his taking jurisdiction in that case.

In 1839, a case of collision on the high seas between two foreign ships of different countries (the very case now under consideration) came before the English Admiralty. The Johann Friederich, 1 W. Rob. 35. A Danish ship was sunk by a Bremen ship, and on the latter being libelled, the respondents entered a protest against the jurisdiction of the court. But jurisdiction was retained by Dr. Lushington who, amongst other things, remarked: "An alien friend is entitled to sue [in our courts] on the same footing as a British-born subject, and if the foreigner in this case had been resident here, and the cause of action had originated *infra corpus comitatus,* no objection could have been taken." Reference being made to the observations of Lord Stowell in cases of seamen's wages, the judge said: "All questions of collision are questions *communis juris;* but in case of mariners' wages, whoever engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs, and the legality of his claim must be tried by such law. One of the most important distinctions, therefore, respecting cases where both parties are foreigners is, whether the case be *communis juris* or not. . . . If these parties must wait until the vessel that has done the injury returned to its own country, their remedy might be altogether lost, for she might never return, and, if she did, there is no part of the world to which they might not be sent for their redress."

In the subsequent case of The Griefswald, 1 Swabey, 430, decided by the same judge in 1859, which arose out of a collision between a British barque and a Persian ship in the Dardanelles, Dr. Lushington said: "In cases of collision, it has been the practice of this country, and, so far as I know, of the European States and of the United States of America, to allow a party alleging grievance by a collision to proceed *in rem* against the ship wherever found, and this practice, it is manifest, is most conducive to justice, because in very many cases a remedy *in personam* would be impracticable."

The subject has frequently been before our own Admiralty Courts of original jurisdiction, and there has been but one opinion expressed, namely, that they have jurisdiction in such cases, and that they will exercise it unless special circumstances exist

to show that justice would be better subserved by declining it. . . . Indeed, where the parties are not only foreigners, but belong to different nations, and the injury or salvage service takes place on the high seas, there seems to be no good reason why the party injured, or doing the service, should ever be denied justice in our courts. Neither party has any peculiar claim to be judged by the municipal law of his own country, since the case is pre-eminently one *communis juris*, and can generally be more impartially and satisfactorily adjudicated by the court of a third nation having jurisdiction of the *res* or parties, than it could be by the courts of either of the nations to which the litigants belong. As Judge Deady very justly said, in a case before him in the district of Oregon: 'The parties cannot be remitted to a home forum, for, being subjects of different governments, there is no such tribunal. The forum which is common to them both by the *jus gentium* is any court of admiralty within the reach of whose process they may both be found.' Bernhard v. Creene, 3 Sawyer, 230, 235.

As to the law which should be applied in cases between parties, or ships, of different nationalities, arising on the high seas, not within the jurisdiction of any nation, there can be no doubt that it must be the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted. . . .

The decree of the Circuit Court is affirmed. . . .

Section 5. Jurisdiction Over Merchant Ships.

REGINA v. ANDERSON.

Court of Criminal Appeal of Great Britain. 1868.
11 Cox, Criminal Cases, 198.

Case reserved by Byles, J., at the October Sessions of the Central Criminal Court, 1868, for the opinion of this court.

James Anderson, an American citizen, was indicted for murder on board a vessel, belonging to the port of Yarmouth in Nova Scotia. She was registered in London, and was sailing under the British flag.

At the time of the offence committed the vessel was in the river Garonne, within the boundaries of the French empire, on her way up to Bordeaux, which city is by the course of the

river about ninety miles from the open sea. The vessel had proceeded about half-way up the river, and was at the time of the offence about three hundred yards from the nearest shore, the river at that place being about half a mile wide.

The tide flows up to the place and beyond it.

No evidence was given whether the place was or was not within the limits of the port of Bordeaux.

It was objected for the prisoner that the offence having been committed within the empire of France, the vessel being a colonial vessel, and the prisoner an American citizen, the Court had no jurisdiction to try him.

I expressed an opinion unfavorable to the objection, but agreed to grant a case for the opinion of this Court.

The prisoner was convicted of manslaughter.

J. Barnard Byles.

Bovill, C. J. There is no doubt that the place where the offence was committed was within the territory of France, and that the prisoner was therefore subject to the laws of France, which the local authorities of that realm might have enforced if so minded; but at the same time, in point of law, the offence was also committed within British territory, for the prisoner was a seaman on board a merchant vessel, which, as to her crew and master, must be taken to have been at the time under the protection of the British flag, and, therefore, also amenable to the provisions of the British law. It is true that the prisoner was an American citizen, but he had with his own consent embarked on board a British vessel as one of the crew. Although the prisoner was subject to the American jurisprudence as an American citizen, and to the law of France as having committed an offence within the territory of France, yet he must also be considered as subject to the jurisdiction of British law, which extends to the protection of British vessels, though in ports belonging to another country. From the passage in the treatise of Ortolan, already quoted, it appears that, with regard to offences committed on board of foreign vessels within the French territory, the French nation will not assert their police law unless invoked by the master of the vessel, or unless the offence leads to a disturbance of the peace of the port; and several instances where that course was adopted are mentioned. Among these are two cases where offences were committed on board American vessels—one at the port of Antwerp, and the other at Marseilles—and where, on the local authorities interfering,

the American Court claimed exclusive jurisdiction. As far as America herself is concerned, it is clear that she, by the statutes of the 23d of March, 1825, has made regulations for persons on board her vessels in foreign parts, and we have adopted the same course of legislation. Our vessels must be subject to the laws of the nation at any of whose ports they may be, and also to the laws of our country, to which they belong. As to our vessels when going to foreign parts we have the right, if we are not bound, to make regulations. America has set us a strong example that we have the right to do so. In the present case, if it were necessary to decide the question on the 17 & 18 Vict. c. 104, I should have no hesitation in saying that we now not only legislate for British subjects on board of British vessels, but also for all those who form the crews thereof, and that there is no difficulty in so construing the statute; but it is not necessary to decide that point now. Independently of that statute, the general law is sufficient to determine this case. Here the offence was committed on board a British vessel by one of the crew, and it makes no difference whether the vessel was within a foreign port or not. If the offence had been committed on the high seas it is clear that it would have been within the jurisdiction of the Admiralty, and the Central Criminal Court has now the same extent of jurisdiction. Does it make any difference because the vessel was in the river Garonne halfway between the sea and the head of the river? The place where the offence was committed was in a navigable part of the river below bridge, and where the tide ebbs and flows, and great ships do lie and hover. An offence committed at such a place, according to the authorities, is within the Admiralty jurisdiction, and it is the same as if the offence had been committed on the high seas. On the whole I come to the conclusion that the prisoner was amenable to the British law, and that the conviction was right.

Byles, J. I am of the same opinion. I adhere to the opinion that I expressed at the trial. A British ship is, for the purposes of this question, like a floating island; and, when a crime is committed on board a British ship, it is within the jurisdiction of the Admiralty Court, and therefore of the Central Criminal Court, and the offender is as amenable to British law as if he had stood on the Isle of Wight and committed the crime. Two English and two American cases decide that a crime committed on board a British vessel in a river like the one in question,

where there is the flux and reflux of the tide, and wherein great ships do hover, is within the jurisdiction of the Admiralty Court; and that is also the opinion expressed in Kent's Commentaries. The only effect of the ship being within the ambit of French territory is that there might have been concurrent jurisdiction had the French claimed it. I give no opinion on the question whether the case comes within the enactment of the Merchant Shipping Act.

BLACKBURN, J. I am of the same opinion. It is not necessary to decide whether the case comes within the Merchant Shipping Act. If the offence could have been properly tried in any English court, then the Central Criminal Court had jurisdiction to try it. It has been decided by a number of cases that a ship on the high seas, carrying a national flag, is part of the territory of that nation whose flag she carries; and all persons on board her are to be considered as subject to the jurisdiction of the laws of that nation, as much so as if they had been on land within that territory. From the earliest times it has been held that the maritime courts have jurisdiction over offences committed on the high seas where great ships go, which are, as it were, common ground to all nations, and that the jurisdiction extends over ships in rivers or places where great ships go as far as the tide extends. In this case the vessel was within French territory, and subject to the local jurisdiction, if the French authorities had chosen to exercise it. Our decisions establish that the Admiralty jurisdiction extends at common law over British ships on the high seas, or in waters where great ships go as far as the tide ebbs and flows. The cases Rex v. Allen, [1 Moo. C. C. 494] and Rex v. Jemot [Old Baily, 1812, MS.] are most closely in point, and establish that offences committed on board British ships in places where great ships go are within the jurisdiction of the Court of Admiralty, and consequently of the Central Criminal Court. In America it appears, from the case of The United States v. Wiltberger, [5 Wheaton, 76] that it was held that the United States had no jurisdiction in the case of the crime of manslaughter committed on board a United States vessel in the river Tigris in China; but, as I understand the American cases of Thomas v. Lane [2 Sumner, 1] and The United States v. Coombes [12 Peters, 71], a rule more in conformity with the English decisions was laid down; and upon those authorities I take it that the American courts would agree with us. It is clear, therefore, that a person

on board a British ship is amenable to the British law just as much as a British person on board an American ship is subject to the American law. My view is, that when a person is on board a vessel sailing under the British flag, and commits a crime, that nation has a right to punish him for the crime committed by him; and clearly the same doctrine extends to those who are members of the crew of the vessel. *Conviction affirmed.*

[Baron Channel and Justice Lush delivered concurring opinions.]

WILDENHUS' CASE.

Supreme Court of the United States. 1887.
120 U. S. 1.

Appeal from the Circuit Court of the United States for the District of New Jersey.

[On board the Belgian steamship Noordland, while lying at its dock in Jersey City, New Jersey, Wildenhus, a Belgian subject and a member of the crew, murdered another Belgian subject, who was also a member of the crew. Thereupon he was arrested by the New Jersey authorities, and the Belgian consul then applied for his release on a writ of *habeas corpus* and surrender to the consul "to be dealt with according to the law of Belgium."]

Mr. Chief Justice Waite . . . delivered the opinion of the court. . . .

The question we have to consider is, whether these prisoners are held in violation of the provisions of the existing treaty between the United States and Belgium.

It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement; for, as was said by Chief Justice Marshall in The Exchange, 7 Cranch, 116, 144, "it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such . . . merchants did not owe temporary and local allegiance, and were not amenable

to the jurisdiction of the country." United States v. Diekelman, 92 U. S. 520; 1 Phillimore's Int. Law, 3d ed. 483, § 351; Twiss' Law of Nations in Time of Peace, 229, § 159; Creasy's Int. Law, 167, § 176; Halleck's Int. Law, 1st ed. 171. And the English judges have uniformly recognized the rights of the courts of the country of which the port is part to punish crimes committed by one foreigner on another in a foreign merchant ship. Regina v. Cunningham, Bell. C. C. 72; S. C. 8 Cox C. C. 104; Regina v. Anderson, 11 Cox C. C. 198, 204; S. C. L. R. 1 C. C. 161, 165; Regina v. Keyn, 13 Cox C. C. 403, 486, 525; S. C. 2 Ex. Div. 63, 161, 213. As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled.

From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority. Such being the general public law on this subject, treaties and conventions have been entered into by nations having commercial intercourse, the purpose of which was to settle and define the rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdictions. . . .

[The learned judge then considers the several types of treaty entered into by the United States for the purpose of regulating the jurisdiction of consuls within its borders.]

It thus appears that at first provision was made only for giving consuls police authority over the interior of the ship and jurisdiction in civil matters arising out of disputes or differences on board, that is to say, between those belonging to the vessel. Under this police authority the duties of the consuls were evidently confined to the maintenance of order and discipline on board. This gave them no power to punish for crimes against the peace of the country. In fact they were expressly prohibited from interfering with the local police in matters of that kind. . . .

In the next conventions consuls were simply made judges and arbitrators to settle and adjust differences between those on board. This clearly related to such differences between those belonging to the vessel as are capable of adjustment and settlement by judicial decision or by arbitration, for it simply made the consuls judges or arbitrators in such matters. That would of itself exclude all idea of punishment for crimes against the state which affected the peace and tranquillity of the port; but, to prevent all doubt on this subject, it was expressly provided that it should not apply to differences of that character.

Next came a form of convention which in terms gave the consul authority to cause proper order to be maintained on board and to decide disputes between the officers and crew, but allowed the local authorities to interfere if the disorders taking place on board were of such a nature as to disturb the public tranquillity, and that is substantially all there is in the convention with Belgium which we have now to consider. . . . Each nation has granted to the other such local jurisdiction within its own dominion as may be necessary to obtain order on board a merchant vessel, but has reserved to itself the right to interfere if the disorder on board is of a nature to disturb the public tranquillity.

The treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere. If it gives the consul of Belgium exclusive jurisdiction over the offence which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty by writ of *habeas corpus* in any proper court of the United States. This being the case, the only important question left for our determination is whether the thing which has been done—the disorder that has arisen—on board this vessel is of a nature to disturb the public peace, or, as some writers term it, the "public

repose'' of the people who look to the State of New Jersey for their protection. If the thing done—''the disorder,'' as it is called in the treaty—is of a character to affect those on shore or in the port when it becomes known, the fact that only those on the ship saw it when it was done is a matter of no moment. Those who are not on the vessel pay no special attention to the mere disputes or quarrels of the seamen while on board, whether they occur under deck or above. Neither do they as a rule care for anything done on board which relates only to the discipline of the ship, or to the preservation of order and authority. Not so, however, with crimes which from their gravity awaken a public interest as soon as they become known, and especially those of a character which every civilized nation considers itself bound to provide a severe punishment for when committed within its own jurisdiction. In such cases inquiry is certain to be instituted at once to ascertain how or why the thing was done, and the popular excitement rises or falls as the news spreads and the facts become known. It is not alone the publicity of the act, or the noise and clamor which attends it, that fixes the nature of the crime, but the act itself. If that is of a character to awaken public interest when it becomes known, it is a ''disorder'' the nature of which is to affect the community at large, and consequently to invoke the power of the local government whose people have been disturbed by what was done. The very nature of such an act is to disturb the quiet of a peaceful community, and to create, in the language of the treaty, a ''disorder'' which will ''disturb tranquillity and public order on shore or in the port.'' The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction, and that if the proper authorities are proceeding with the case in a regular way, the consul has no right to interfere to prevent it. That, according to the petition for the *habeas corpus*, is this case.

This is fully in accord with the practice in France, where the

government has been quite as liberal towards foreign nations in this particular as any other, and where, as we have seen in the cases of The Sally and The Newton, by a decree of the Council of State, representing the political department of the government, the French courts were prevented from exercising jurisdiction. But afterwards, in 1859, in the case of Jally, the mate of an American merchantman who had killed one of the crew and severely wounded another on board the ship in the port of Havre, the Court of Cassation, the highest judicial tribunal of France, upon full consideration held, while the Convention of 1853 was in force, that the French courts had rightful jurisdiction, for reasons which sufficiently appear in the following extract from its judgment:

"Considering that it is a principle of the law of nations that every state has sovereign jurisdiction throughout its territory;

"Considering that by the terms of Article 3 of the Code Napoleon the laws of police and safety bind all those who inhabit French territory, and that consequently foreigners, even *transeuntes,* find themselves subject to those laws;

"Considering that merchant vessels entering the port of a nation other than that to which they belong cannot be withdrawn from the territorial jurisdiction, in any case in which the interest of the state of which that port forms part finds itself concerned, without danger to good order and to the dignity of the government;

"Considering that every state is interested in the repression of crimes and offences that may be committed in the ports of its territory, not only by the men of the ship's company of a foreign merchant vessel towards men not forming part of that company, but even by men of the ship's company among themselves, whenever the act is of a nature to compromise the tranquillity of the port, or the intervention of the local authority is invoked, or the act constitutes a crime of common law," (*droit commun,* the law common to all civilized nations), "the gravity of which does not permit any nation to leave it unpunished, without impugning its rights of jurisdictional and territorial sovereignty, because that crime is in itself the most manifest as well as the most flagrant violation of the laws which it is the duty of every nation to cause to be respected in all parts of its territory." 1 Ortolan Diplomatie de la Mer (4th ed.), pp. 455, 456; Sirey (N. S.), 1859, p. 189.

The judgment of the Circuit Court is affirmed.

NOTE.—The jurisdiction of the local authorities over merchant vessels in their waters is generally conceded, although in practice many nations do not exercise it over acts committed on board the vessel which affect only the vessel or its company. As to the murder of one member of the crew by another, see The Forsattning (1837), Phillimore, I, 485 (French Government ordered the prisoner, a Swede, to be surrendered to his government); L'Anemone (1875), Snow, *Cases,* 124 (Supreme Court of Mexico declined jurisdiction). As to the use on a foreign ship of an article covered by a local patent, see Caldwell v. Van Vlissingen (1851), 9 Hare, 415; Brown v. Duchesne (1857), 19 Howard, 183. As to the assumption of jurisdiction over offenses committed on vessels in foreign waters, see United States v. Rodgers (1893), 150 U. S. 249; The Kestor (1901), 110 Fed. 432; The Eudora (1901), 110 Fed. 430. See also Bonfils (Fauchille), 410, and Moore, *Digest,* II, 272.

SECTION 6. JURISDICTION DERIVED FROM MILITARY OCCUPATION.

THE UNITED STATES v. RICE.

SUPREME COURT OF THE UNITED STATES. 1819.
4 Wheaton, 246

Error to the Circuit Court of Massachusetts.

MR. JUSTICE STORY delivered the opinion of the Court.

The single question arising on the pleadings in this case is, whether goods imported into Castine during its occupation by the enemy are liable to the duties imposed by the revenue laws upon goods imported into the United States. It appears, by the pleadings, that on the first day of September, 1814, Castine was captured by the enemy, and remained in his exclusive possession, under the command and control of his military and naval forces, until after the ratification of the treaty of peace in February, 1815. During this period, the British government exercised all civil and military authority over the place; and established a custom-house, and admitted goods to be imported, according to regulations prescribed by itself, and, among others, admitted the goods upon which duties are now demanded. These goods remained at Castine until after it was evacuated by the enemy; and, upon the reëstablishment of the American government, the collector of the customs, claiming a right to American duties on the goods, took the bond in question from the defendant, for the security of them.

Under these circumstances, we are all of opinion, that the claim for duties cannot be sustained. By the conquest and mili-

tary occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants, were subject to such duties only as the British government chose to require. Such goods were in no correct sense imported into the United States. The subsequent evacuation by the enemy, and resumption of authority by the United States, did not, and could not, change the character of the previous transactions. The doctrines respecting the *jus postliminii* are wholly inapplicable to the case. The goods were liable to American duties, when imported, or not at all. That they were not so liable at the time of importation is clear from what has been already stated; and when, upon the return of peace, the jurisdiction of the United States was re-assumed, they were in the same predicament as they would have been if Castine had been a foreign territory ceded by treaty to the United States, and the goods had been previously imported there. In the latter case, there would be no pretence to say that American duties could be demanded; and, upon principles of public or municipal law, the cases are not distinguishable. The authorities cited at the bar would, if there were any doubt, be decisive of the question. But we think it too clear to require any aid from authority.

Judgment affirmed, with costs.

THE GERASIMO.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1857.
11 Moore, Privy Council, 88.

Appeal from the High Court of Admiralty of England.

[In the Crimean War, the Gerasimo, a ship under the Wallachian flag, with a cargo of corn belonging to residents of Galatz,

in Moldavia, was captured by the British when coming out of the Danube, the mouth of which was then blockaded by the British fleet. When the cargo was shipped, the Russians were in possession of Moldavia and Wallachia, but disclaimed any intention of altering their political status or of incorporating them in the Russian empire. The Court of Admiralty however condemned the cargo on the ground that it belonged to inhabitants of enemy territory.]

The Right Hon. T. Pemberton Leigh [Lord Kingsdown]:

. . .

Upon the present appeal the first question is, whether the owners of the cargo, in regard to this claim, are to be considered as alien enemies; and for this purpose it will be necessary to examine carefully both the principles of law which are to govern the case, and the nature of the possession which the Russians held of Moldavia at the time of this shipment.

Upon the general principles of law applicable to this subject there can be no dispute. The national character of a trader is to be decided for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of the trade, as a subject of the Power under whose dominion he carries it on, and, of course, as an enemy of those with whom that Power is at war. Nothing can be more just than this principle; but the whole foundation of it is, that the country in which the merchant trades is enemy's country.

Now the question is, what are the circumstances necessary to convert friendly or neutral territory into enemy's territory? For this purpose, is it sufficient that the territory in question should be occupied by a hostile force, and subjected, during its occupation, to the control of the hostile Power, so far as such Power may think fit to exercise control; or is it necessary that, either by cession or conquest, or some other means, it should, either permanently or temporarily, be incorporated with, and form part of, the dominions of the invader at the time when the question of national character arises?

It appears to their Lordships that the first proposition cannot be maintained. It is impossible for any Judge, however able and learned, to have always present to his mind all the nice distinc

tions by which general rules are restricted; and their Lordships are inclined to think that, if the authorities which were cited and so ably commented upon at this Bar had been laid before the Judge of the Court below, he would, perhaps, have qualified in some degree the doctrine attributed to him in the judgment to which we have referred.

With respect to the meaning of the term "dominions of the enemy," and what is necessary to constitute dominion, Lord Stowell has in several cases expressed his opinion. In the case of The Fama (5 Rob. 115), he lays it down that in order to complete the right of property, there must be both right to the thing and possession of it; both *jus ad rem* and *jus in re*. "This," he observes, "is the general law of property, and applies, I conceive, no less to the right of territory than to other rights. Even in newly-discovered countries, when a title is meant to be established, for the first time, some act of possession is usually done and proclaimed as a notification of the fact. In transfer, surely, when the former rights of others are to be superseded and extinguished, it cannot be less necessary that such a change should be indicated by some public acts, that all who are deeply interested in the event, as the inhabitants of such Settlements, may be informed under whose dominion and under what laws they are to live."

The importance of this doctrine will appear when the facts with respect to the occupation of the Principalities come to be examined.

That the national character of a place is not changed by the mere circumstance that it is in the possession and under the control of a hostile force, is a principle held to be of such importance that it was acted upon by the Lords of Appeal in 1808, in the St. Domingo cases of The "Dart" and "Happy Couple," when the rule operated with extreme hardship.

In the case of The "Manilla" (1 Edw. 3), Lord Stowell gives the following account of those decisions: "Several parts of it [the Island of St. Domingo] had been in the actual possession of insurgent negroes, who had detached them, as far as actual occupancy could do, from the mother country of France and its authority, and maintained, within those parts at least, an independent government of their own. And although this new power had not been directly and formally recognized by any express treaty, the British Government had shown a favourable disposition towards it on the ground of its common opposition to France, and seemed to tolerate an intercourse that carried

with it a pacific and even friendly complexion. It was contended, therefore, that St. Domingo could not be considered as a colony of the enemy. The Court of Appeal, however, decided, though after long deliberation, and with much expressed reluctance, that nothing had been declared or done by the British Government that could authorize a British tribunal to consider this Island generally, or parts of it (notwithstanding a Power hostile to France had established itself within it, to that degree of force, and with that kind of allowance from some other States), as being other than still a colony, or parts of a colony of the enemy. There can be no doubt that the strict principle of that decision was correct."

On the other hand, when places in a friendly country have been seized by, and are in the possession of the enemy, the same doctrine has been held.

While Spain was in the occupation of France, and at war with Great Britain, the Spanish insurrection broke out, and the British Government issued a proclamation that all hostilities against Spain should immediately cease. Great part of Spain, however, was still occupied by French troops, and amongst others, the port of St. Andero. A ship called The "Santa Anna" was captured on a voyage, as it was alleged, to St. Andero, and Lord Stowell (1 Edw. 182) observed:—"Under these public declarations of the State, establishing this general peace and amity, I do not know that it would be in the power of the Court to condemn Spanish property, though belonging to persons resident in those parts of Spain which are at the present moment under French control, except under such circumstances as would justify the confiscation of neutral property."

The same principle has been acted upon in the Courts of Common Law.

In the case of Donaldson v. Thompson (1 Campb. 429), the Russian troops were in possession of Corfu and the other Ionian Islands, though the form of a Republic was preserved, and it was contended that the Islands must be considered as substantially part of the territory of the Russian Empire, if the Russian power was there dominant, and the supreme authority was in the Russian Commander; or, if not, that the Republic must be considered as a co-belligerent with Russia against the Porte, since the Emperor of Russia derived the same advantages, in a military point of view, from this occupation of the Islands as if he had seized it hostilely, or the Ionian Republic had been his ally in the war he was carrying on. Both these propositions,

however, were repudiated by Lord Ellenborough; and afterwards, on a motion to set aside the verdict by the Court of King's Bench, Lord Ellenborough observed:—"Will any one contend that a Government which is obliged to yield in any quarter to a superior force becomes a co-belligerent with the power to which it yields? It may as well be contended that neutral and belligerent mean the same thing." The same doctrine was afterwards laid down by the Court of King's Bench, in Hagedorn v. Bell, (1 Mau. and Sel. 450), in the case of a trade carried on with Hamburg, which had been for several years, and at the time was in the military occupation of the French.

The distinction between hostile occupation and possession clothed with a legal right by cession or conquest, or confirmed by length of time, is recognized by Lord Stowell in the case of The "Bolletta," (1 Edw. 171). A question there arose whether certain property belonging to merchants at Zante, which had been captured by a British privateer, was to be considered as French or as Russian property, that question depending upon the national character of Zante at the time of the capture. Lord Stowell observes, p. 173:—"On the part of the Crown it has been contended, that the possession taken by the French was of a forcible and temporary nature, and that such a possession does not change the national character of the country until it is confirmed by a formal cession, or by long lapse of time. That may be true, when possession has been taken by force of arms and by violence; but this is not an occupation of that nature. France and Russia had settled their differences by the treaty of Tilsit, and the two countries being at peace with each other, it must be understood to have been a voluntary surrender of the territory on the part of Russia." On this ground he held the territory to have become French territory, remarking in a subsequent passage of his judgment that this was a cession by treaty, and not an hostile occupation by force of arms, liable to be lost again the next day.

These authorities, with the other cases cited at the Bar, seem to establish the proposition, that the mere possession of a territory by an enemy's force does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies. . . .

Their Lordships have no hesitation in advising restitution of the cargo, with costs and damages against the captors.

DOOLEY v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1901.
182 U. S. 222.

Error to the Circuit Court of the United States for the Southern District of New York.

This was an action begun in the Circuit Court, as a Court of Claims, by the firm of Dooley, Smith & Co., engaged in trade and commerce between Porto Rico and New York, to recover back certain duties to the amount of $5,374.68, exacted and paid under protest at the port of San Juan, Porto Rico, upon several consignments of merchandise imported into Porto Rico from New York between July 26, 1898, and May 1, 1900, viz.:

1. From July 26, 1898, until August 19, 1898, under the terms of the proclamation of General Miles, directing the exaction of the former Spanish and Porto Rican duties.

2. From August 19, 1898, until February 1, 1899, under the customs tariff for Porto Rico, proclaimed by order of the President.

3. From February 1, 1899, to May 1, 1900, under the amended tariff customs promulgated January 20, 1899, by order of the President.

It thus appears that the duties were collected partly before and partly after the ratification of the treaty [by which Porto Rico was ceded to the United States], but in every instance prior to the taking effect of the Foraker act. The revenues thus collected were used by the military authorities for the benefit of the provisional government.

A demurrer was interposed upon the ground of the want of jurisdiction and the insufficiency of the complaint. The Circuit Court sustained the demurrer upon the second ground, and dismissed the petition. Hence this writ of error. . . .

MR. JUSTICE BROWN . . . delivered the opinion of the court. . . .

In their legal aspect, the duties exacted in this case were of three classes: (1) the duties prescribed by General Miles under order of July 26, 1898, which merely extended the existing regulations; (2) the tariffs of August 19, 1898, and February 1, 1899, prescribed by the President as Commander-in-Chief, which continued in effect until April 11, 1899, the date of the ratification of the treaty and the cession of the island

to the United States; (3) from the ratification of the treaty to May 1, 1900, when the Foraker act took effect.

There can be no doubt with respect to the first two of these classes, namely, the exaction of duties under the war power, prior to the ratification of the treaty of peace. While it is true the treaty of peace was signed December 10, 1898, it did not take effect upon individual rights, until there was an exchange of ratifications. Haver v. Yaker, 9 Wall. 32. Upon the occupation of the country by the military forces of the United States, the authority of the Spanish Government was superseded, but the necessity for a revenue did not cease. The government must be carried on, and there was no one left to administer its functions but the military forces of the United States. Money is requisite for that purpose, and money could only be raised by order of the military commander. The most natural method was by the continuation of existing duties. In adopting this method, General Miles was fully justified by the laws of war. The doctrine upon this subject is thus summed up by Halleck in his work on International Law, (vol. 2, page 444): "The right of one belligerent to occupy and govern the territory of the enemy while in its military possession, is one of the incidents of war, and flows directly from the right to conquer. We, therefore, do not look to the Constitution or political institutions of the conqueror, for authority to establish a government for the territory of the enemy in his possession, during its military occupation, nor for the rules by which the powers of such government are regulated and limited. Such authority and such rules are derived directly from the laws of war, as established by the usage of the world, and confirmed by the writings of publicists and decisions of courts—in fine, from the law of nations. . . . The municipal laws of a conquered territory, or the laws which regulate private rights, continue in force during military occupation, except so far as they are suspended or changed by the acts of the conqueror. . . . He, nevertheless, has all the powers of a *de facto* government, and can at his pleasure either change the existing laws or make new ones."

In New Orleans v. Steamship Co., 20 Wall 387, 393, it was said, with respect to the powers of the military government over the city of New Orleans after its conquest, that it had "the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war. In such cases the conquering power has the

right to displace the pre-existing authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. These principles have the sanction of all publicists who have considered the subject." See also Thirty Hogsheads of Sugar v. Boyle, 9 Cr. 191; Fleming v. Page, 9 How. 603; American Ins. Co. v. Canter, 1 Pet. 511.

But it is useless to multiply citations upon this point, since the authority to exact similar duties was fully considered and affirmed by this court in Cross v. Harrison, 16 How. 164. This case involved the validity of duties exacted by the military commander of California upon imports from foreign countries, from the date of the treaty of peace, February 3, 1848, to November 14, 1849, when the collector of customs appointed by the President entered upon the duties of his office. Prior to the treaty of peace, and from August, 1847, duties had been exacted by the military authorities, the validity of which does not seem to have been questioned. Page 189: "That war tariff, however, was abandoned as soon as the military governor had received from Washington information of the exchange and ratification of the treaty with Mexico, and duties were afterwards levied in conformity with such as Congress had imposed upon foreign merchandise imported into other ports of the United States, Upper California having been ceded by the treaty to the United States." The duties were held to have been legally exacted. Speaking of the duties exacted before the treaty of peace, Mr. Justice Wayne observed (p. 190): "No one can doubt that these orders of the President, and the action of our Army and Navy commanders in California, in conformity with them, was according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of a treaty of peace. Such would be the case upon general principles in respect to war and peace between nations." It was further held that the right to collect these duties continued from the date of the treaty up to the time when official notice of its ratification and exchange were received in California. Owing to the fact that no telegraphic communication existed at that

time, the news of the ratification of this treaty did not reach California until August 7, 1848, during which time the war tariff was continued. The question does not arise in this case, as the ratifications of the treaty appear to have been known as soon as they were exchanged.

The court further held in Cross v. Harrison that the right of the military commander to exact the duties prescribed by the tariff laws of the United States continued until a collector of customs had been appointed. Said the court: "The government, of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted by the command of the President of the United States. It was the government when the territory was conceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence, of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed. . . . We think it was continued over a ceded conquest, without any violation of the Constitution or laws of the United States, and that, until Congress legislated for it, the duties upon foreign goods, imported into San Francisco, were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment, according to instructions from Washington, from Governor Mason."

Upon this point that case differs from the one under consideration only in the particular that the duties were levied in Cross v. Harrison upon goods imported from foreign countries into California, while in the present case they were imported from New York, a port of the conquering country. This, however, is quite immaterial. The United States and Porto Rico were still foreign countries with respect to each other, and the same right which authorized us to exact duties upon merchandise imported from Porto Rico to the United States authorized the military commander in Porto Rico to exact duties upon goods imported into that island from the United States. The fact that, notwithstanding the military occupation of the United States, Porto Rico remained a foreign country within the revenue laws is established by the case of Fleming v. Page, 9 How. 603, in which we held that the capture and occupation of a Mexican port during our war with that country did not

make it a part of the United States, and that it still remained a foreign country within the meaning of the revenue laws. The right to exact duties upon goods imported into Porto Rico from New York arises from the fact that New York was still a foreign country with respect to Porto Rico, and from the correlative right to exact at New York duties upon merchandise imported from that island. . . .

Without questioning at all the original validity of the order imposing duties upon goods imported into Porto Rico from foreign countries, we think the proper construction of that order is, that it ceased to apply to goods imported from the United States from the moment the United States ceased to be a foreign country with respect to Porto Rico, and that until Congress otherwise constitutionally directed, such merchandise was entitled to free entry.

An unlimited power on the part of the Commander-in-Chief to exact duties upon imports from the States might have placed Porto Rico in a most embarrassing situation. The ratification of the treaty and the cession of the island to us severed her connection with Spain, of which the island was no longer a colony, and with respect to which she had become a foreign country. The wall of the Spanish tariff was raised against her exports, the wall of the military tariff against her imports, from the mother country. She received no compensation from her new relations with the United States. If her exports, upon arriving there, were still subject to the same duties as merchandise arriving from other foreign countries, while her imports from the United States were subjected to duties prescribed by the Commander-in-Chief, she would be placed in a position of practical isolation, which could not fail to be disastrous to the business and finances of an island. It had no manufactures or markets of its own, and was dependent upon the markets of other countries for the sale of her productions of coffee, sugar and tobacco. In our opinion the authority of the President as Commander-in-Chief to exact duties upon imports from the United States ceased with the ratification of the treaty of peace, and her right to the free entry of goods from the ports of the United States continued until Congress should constitutionally legislate upon the subject.

The judgment of the Circuit Court is therefore reversed. . .

Mr. Justice White, (with whom concurred Mr. Justice Gray, Mr. Justice Shiras and Mr. Justice McKenna,) dissenting. . . .

MacLEOD v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1913.
229 U. S. 416.

Appeal from the Court of Claims.

[War having been declared between the United States and Spain on April 25, 1898, the forces of the United States on May 1 following captured Manila Bay and harbor. On July 12, the President of the United States issued an order setting forth a "tariff of duties and taxes to be levied, and collected as a military contribution" in all ports and places in the Philippine Islands which should be occupied by the American forces. On December 25, 1898, the Spanish forces evacuated the Island of Cebu, having first appointed a provisional governor. Shortly thereafter the native inhabitants, formerly in insurrection against Spain, took possession of the island, established a republic, and administered the island until possession was surrendered to the United States on February 22, 1899, prior to which time no authorities of the United States had been in the island. While the island was under control of its native inhabitants, the appellant, charterer of the American steamship Venus, which arrived at Cebu, with a cargo of rice, from Saigon, China, on January 29, 1899, was required to pay duties to the native government before he was permitted to land his cargo. The steamer then proceeded to Manila, where the American authorities, acting under the President's proclamation of July 12, 1898, exacted a second payment of duties on the same cargo. The appellant paid the duties under protest and then brought suit in the Court of Claims for their recovery. That court having dismissed his petition, 45 Ct. Cl. 339, he appealed to this court.]

MR. JUSTICE DAY . . . delivered the opinion of the court.

When the Spanish fleet was destroyed at Manila, May 1, 1898, it became apparent that the Government of the United States might be required to take the necessary steps to make provision for the government and control of such part of the Philippines as might come into the military occupation of the forces of the United States. The right to thus occupy an enemy's country and temporarily provide for its government has been recognized by previous action of the executive authority and sanc-

tioned by frequent decisions of this court. The local government being destroyed, the conqueror may set up its own temporary government, and to that end may collect taxes and duties to support the military authority and carry on operations incident to the occupation. Such was the course of the Government with respect to the territory acquired by conquest and afterwards ceded by the Mexican Government to the United States. Cross v. Harrison, 16 How. 164. See also in this connection Fleming v. Page, 9 How. 603; New Orleans v. Steamship Co., 20 Wall. 387; Dooley v. United States, 182 U. S. 222; 7 Moore's International Law Digest, §§ 1143 et seq., in which the history of this government's action following the Mexican War and during and after the Spanish-American War is fully set forth: and also Taylor on International Public Law, chapter ix, Military Occupation and Administration, §§ 568 et seq., and 2 Oppenheim on International Law, §§ 166 et seq.

There has been considerable discussion in the cases and in works of authoritative writers upon the subject of what constitutes an occupation which will give the right to exercise government authority. Such occupation is not merely invasion, but is invasion plus possession of the enemy's country for the purpose of holding it temporarily at least. 2 Oppenheim, § 167. What should constitute military occupation was one of the matters before The Hague Convention in 1899 respecting laws and customs of war on land, and the following articles were adopted by the nations giving adherence to that Convention, among which is the United States (32 Stat. II, 1821):

"Article XLII. Territory is considered occupied when it is actually placed under the authority of the hostile army.

"The occupation applies only to the territory where such authority is established, and in a position to assert itself.

"Article XLIII. The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to reëstablish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

A reference to the Messages and Papers of the Presidents, to which we may refer as matters of public history, shows that the President was sensible of and disposed to conform the activities of our Government to the principles of international law and practice. See 10 Messages and Papers of the Presidents, 208, executive order of the President to the Secretary of War, in which the President said (p. 210):

"While it is held to be the right of a conqueror to levy contributions upon the enemy in their seaports, towns, or provinces which may be in his military possession by conquest, and to apply the proceeds to defray the expenses of the war, this right is to be exercised within such limitations that it may not savor of confiscation. As the result of military occupation the taxes and duties payable by the inhabitants to the former government become payable to the military occupant, unless he sees fit to substitute for them other rates or modes of contributions to the expenses of the government. The moneys so collected are to be used for the purpose of paying the expenses of government under the military occupation, such as the salaries of the judges and the police, and for the payment of the expenses of the army."

To the same affect, executive order of the President to the Secretary of the Treasury, in which the President said (p. 211):

"I have determined to order that all ports or places in the Philippines which may be in the actual possession of our land and naval forces by conquest shall be opened, while our military occupation may continue, to the commerce of all neutral nations, as well as our own, in articles not contraband of war, upon payment of the rates of duty which may be in force at the time when the goods are imported."

And the like executive order of the President to the Secretary of the Navy (p. 212).

In pursuance of this policy, the order of July 12, 1898, was framed. By its plain terms the President orders and directs the collection of tariff duties at ports in the occupation and possession of the forces of the United States. More than this would not have been consistent with the principles of international law, nor with the practice of this Government in like cases. While the subsequent order of December 21, 1898, made after the signing of the treaty of peace, is referred to in the brief of counsel for the Government, it was not alluded to in the findings of fact of the Court of Claims; but we find in that order nothing indicating a change of policy in respect to the collection of duties. While the signing of the treaty of peace between the United States and Spain on December 10, 1898, was stated, the responsible obligations imposed upon the United States by reason thereof were recited and acknowledged and the necessity of extending the government with all possible dispatch to the whole of the ceded territory was emphasized, no disposition was shown to enlarge the number of ports and places in

the Philippine Islands at which duties should be collected so as to include those not occupied by the United States, and the President said (p. 220):

"All ports and places in the Philippine Islands in the actual possession of the land and naval forces of the United States will be opened to the commerce of all friendly nations. All goods and wares not prohibited for military reasons, by due announcement of the military authority, will be admitted upon payment of such duties and other charges as shall be in force at the time of their importation."

The occupation by the United States of the city, bay and harbor of Manila pending the conclusion of a treaty which should determine the control, disposition and government of the Philippines was provided for by the protocol of August 12, 1898, and the necessity of further occupation until the exchange of ratifications by the Government of Spain and the United States, was recognized by the President in the order of December 21, 1898. We have been unable to find anything in the executive or congressional action prior to the importation of the cargo now in question having the effect to extend the executive order as to the collection of duties during the military occupation to ports and places not within the occupation and control of the United States.

The statement of the facts shows that the insurgent government was in actual possession of the custom-house at Cebu, with power to enforce the collection of duties there, as it did. Such government was of the class of *de facto* governments described in 1 Moore's International Law Digest, § 20, as follows:

"But there is another description of government, called also by publicists a government *de facto,* but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1) that its existence is maintained by active military power within the territories, and against the rightful authority of an established and lawful government; and (2) that while it exists it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience rendered in submission to such force, do not become responsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered, also, by

civil authority, supported more or less directly by military force." Thorington v. Smith, 8 Wall. 1, 9.

The attitude of this Government toward such *de facto* governments was evidenced in the Bluefields case, a full account of which is given in 1 Moore's International Law Digest, pp. 49 *et seq.* In that case General Reyes had headed an insurrectionary movement at Bluefields and acquired actual control of the Mosquito Territory in Nicaragua. His control continued for a short time only, February 3 to February 25, 1899, and after the reëstablishment of the Nicaraguan Government at Bluefields it demanded of American merchants the payment to it of certain amounts of duty which they had been compelled to pay to the insurgent authorities during the period of their *de facto* control. The American Government remonstrated, and the duties demanded by the Nicaraguan Government were by agreement deposited in the British consulate pending a settlement of the controversy. The Department of State of the United States, upon receiving sworn statements of the American merchants to the effect that they were not accomplices of Reyes, that the money actually exacted was the amount due on bonds which then matured for duties levied in December, 1898, payments being made to the agent of the titular government who was continued in office by General Reyes, that payment was demanded under threat of suspension of importations, and that from February 3 to February 25 General Reyes was in full control of the civil and military agencies in the district, expressed the opinion that to exact the second payment would be an act of international injustice: and the money was finally returned to the American merchants with the assent of the Government of Nicaragua.

A similar case appears in 1 Moore's International Digest, p. 49, in which our Government was requested by Great Britain to use its good offices to prevent the exaction by the Mexican Government of certain duties at Mazatlan, which had been previously paid to insurgents. The then Secretary of State, Mr. Fish, instructed our Minister to Mexico as follows:

"It is difficult to understand upon what ground of equity or public law such duties can be claimed. The obligation of obedience to a government at a particular place in a country may be regarded as suspended, at least, when its authority is usurped, and is due to the usurpers if they choose to exercise it. To require a repayment of duties in such cases is tantamount to the exaction of a penalty on the misfortune, if it may

be so called, of remaining and carrying on business in a port where the authority of the government had been annulled. The pretension is analogous to that upon which vessels have been captured and condemned upon a charge of violating a blockade of a port set on foot by a proclamation only, without force to carry it into effect."

See also Colombian Controversy, 6 Moore's International Law Digest, pp. 995 *et seq.* . . .

We do not think that it was the purpose of the executive order under which the government at Manila was instituted and maintained at the time of this importation to direct the collection of the duties at ports not in the occupation of the United States, and certainly not at one actually in the possession of a *de facto* government, as is shown in this case. . . .

We think the Court of Claims was in error in holding the duties collectible at Manila under the circumstances related. . . . Its judgment will therefore be reversed and the case remanded to the Court of Claims with instructions to enter judgment for the claimant. *Reversed.*

NOTE.—The most important discussions of the law governing military occupation are Fleming v. Page (1850), 9 Howard, 603; Cross v. Harrison (1854), 16 Ib. 164; Leitensdorfer v. Webb (1858), 20 Ib. 176; New Orleans v. Steamship Co. (1875), 20 Wallace, 387; Coleman v. Tennessee (1879), 97 U. S. 509. See also Bonfils (Fauchille), 762, and Moore, *Digest*, VII, 257.

In determining upon the measures and methods of government to be adopted in the occupied territory, the occupant is limited only by the restraints of his own municipal law and by the laws and usages of war, Little v. Barreme (1804), 2 Cranch, 168; Mitchell v. Harmony (1852), 13 Howard, 115; United States v. Diekelman (1876), 92 U. S. 520; Dow v. Johnson (1880), 100 U. S. 158; Gates v. Goodloe (1880), 101 U. S. 612. He may enforce the existing local law or substitute a new system of his own making, United States v. Reiter (1865), 27 Fed. Cases, No. 16146. The system of military government does not necessarily cease with the termination of war, Cross v. Harrison (1854), 16 Howard, 164. *Contra*, Ex parte Ortiz (1900), 100 Fed. 955. Allegiance to the conqueror during a temporary military occupation merely suspends the former allegiance. It does not make the inhabitants aliens *de facto*, Shanks v. Dupont (1830), 3 Peters, 242; United States v. Huckabee (1873), 16 Wallace, 414.

The terms martial law and military law are frequently used synonymously. This is erroneous. Military law applies only to persons in the military and naval forces and applies to them in both peace and war. Martial law presupposes a state of war or grave disorder necessitating the substitution of summary military methods for the more deliberate methods of the civil law. When once established it applies to all persons, both civil and military, in the district concerned, Johnson v. Jones (1867), 44 Illinois, 142, 153; Grove v. Mott (1884), 46 New Jersey Law, 328, 331.

The relation between martial law and the civil law is considered in Ex parte Milligan (1866), 4 Wallace, 2, and Marais v. Attorney General of Natal (1902), L. R. [1902] A. C. 109.

For further discussion of the legal effects of military occupation, see Birkhimer, *Military Government and Martial Law;* Pitt Cobbett, *Cases and Opinions,* II, 108; Magoon, *Reports,* 11-36, 225-228, 261-455; Moore, *Digest,* I, 45, VII, 257 and cases cited.

Section 7. Exemptions from Jurisdiction.

THE SCHOONER EXCHANGE v. M'FADDON & OTHERS.

Supreme Court of the United States. 1812.
7 Cranch, 116.

Appeal from the Circuit Court of the United States for the district of Pennsylvania.

[The schooner Exchange, belonging to John M'Faddon and William Greetham, citizens of Maryland, while on a voyage from Baltimore to Spain in December, 1810, was seized in pursuance of the Rambouillet Decree by officers of the Emperor Napoleon, taken to France, converted into a public vessel, and given the name Balaou. The vessel having put into Philadelphia in July, 1811, her original owners filed a libel praying that she be attached and returned to them. Thereupon the United States District Attorney suggested to the court that the vessel was a public vessel, the property of a power with which the United States was at peace, and consequently not within the jurisdiction of the court. The decision of the District Court dismissing the libel having been reversed by the Circuit Court, an appeal was taken to this court.]

Marshall, Ch. J. delivered the opinion of the Court as follows:

This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States.

The question has been considered with an earnest solicitude, that the decision may conform to those principles of national and municipal law by which it ought to be regulated.

In exploring an unbeaten path, with few, if any aids, from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this.

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its own sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restrictions.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either expressed or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, will be extended to him.

This perfect equality and absolute independence of sovereigns,

and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.

If he enters that territory with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation.

Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection that the license has been obtained. The character to whom it is given, and the object for which it is granted, equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case.

Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which is not necessary to any conclusion to which the Court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands.

2d. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers.

Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose Court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of

exterritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

This consent is not expressed. It is true that in some countries, and in this among others a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be

defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

But if, without such express permit, an army should be led through the territories of a foreign prince, might the jurisdiction of the territory be rightfully exercised over the individuals composing this army?

Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed by a particular license, be expressed by a general declaration that foreign troops may pass through a specified tract of country, a distinction between such general permit and a particular license is not perceived. It would seem reasonable that every immunity which would be conferred by a special license, would be in like manner conferred by such general permit.

We have seen that a license to pass through a territory implies immunities not expressed, and it is material to inquire why the license itself may not be presumed?

It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like these that the general license to foreigners to enter the dominions of a friendly power, is never understood to extend to a military force; and an army marching into the dominions of another sovereign, may justly be considered as committing an act of hostility; and, if not opposed by force, acquires no privileges by its irregular and improper conduct. It may however well be

questioned whether any other than the sovereign power of the state be capable of deciding that such military commander is without a license.

But the rule which is applicable to armies, does not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers often, indeed generally, attending it, do not ensue from admitting a ship of war, without a special license, into a friendly port. A different rule therefore with respect to this species of military force has been generally adopted. If, for reasons of state, the ports of a nation generally, or any particular ports be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them while allowed to remain, under the protection of the government of the place.

In almost every instance, the treaties between civilized nations contain a stipulation to this effect in favor of vessels driven in by stress of weather or other urgent necessity. In such cases the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty binds him to allow vessels in distress to find refuge and asylum in his ports, and this is a license which he is not at liberty to retract. It would be difficult to assign a reason for withholding from a license thus granted, any immunity from local jurisdiction which would be implied in a special license.

If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible, that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived by the Court for distinguishing their case from that of vessels which enter by express assent.

In all the cases of exemption which have been reviewed, much has been implied, but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?

In this part of the subject a difficulty is to be encountered, the seriousness of which is acknowledged, but which the Court will not attempt to evade.

Those treaties which provide for the admission and safe departure of public vessels entering a port from stress of weather, or other urgent cause, provide in like manner for the private vessels of the nation; and where public vessels enter a port under the general license which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant vessels entering the same port for the purposes of trade who cannot thereby claim any exemption from the jurisdiction of the country. It may be contended, certainly with much plausibility if not correctness, that the same rule, and same principle are applicable to public and private ships; and since it is admitted that private ships entering without special license become subject to the local jurisdiction, it is demanded on what authority an exception is made in favor of ships of war.

It is by no means conceded, that a private vessel really availing herself of an asylum provided by treaty, and not attempting to trade, would become amenable to the local jurisdiction, unless she committed some act forfeiting the protection she claims under compact. On the contrary, motives may be assigned for stipulating, and according immunities to vessels in cases of distress, which would not be demanded for, or allowed to those which enter voluntarily and for ordinary purposes. On this part of the subject, however, the Court does not mean to indicate any opinion. The case itself may possibly occur, and ought not to be pre-judged.

Without deciding how far such stipulations in favor of distressed vessels, as are usual in treaties, may exempt private ships from the jurisdiction of the place, it may safely be asserted, that the whole reasoning upon which such exemption has been implied in other cases, applies with full force to the exemption of ships of war in this.

"It is impossible to conceive," says Vattel, "that a Prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an additional argument, which completely establishes the independency of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independency; and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation."

Equally impossible is it to conceive, whatever may be the con-

struction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

To the Court, it appears, that where, without treaty, the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

The preceding reasoning, has maintained the propositions that all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act.

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.

But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being de-

feated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.

Bynkershoek, a jurist of great reputation, has indeed maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual, and has quoted several cases in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is intrusted to govern.

The only applicable case cited by Bynkershoek, is that of the Spanish ships of war seized in Flushing for a debt due from the king of Spain. In that case, the states general interposed; and there is reason to believe, from the manner in which the transaction is stated, that, either by the interference of government, or the decision of the court, the vessels were released.

This case of the Spanish vessels is, it is believed, the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince, by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the power of proceeding in the same manner against the private property of the prince, would seem to furnish

no feeble argument in support of the universality of the opinion in favor of the exemption claimed for ships of war. The distinction made in our own laws between public and private ships would appear to proceed from the same opinion.

It seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country, in which it is found, ought not, in the opinion of this Court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction.

The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention. But the argument has already been drawn to a length, which forbids a particular examination of these points.

The principles which have been stated, will now be applied to the case at bar.

In the present state of the evidence and proceedings, the Exchange must be considered as a vessel which was the property of the Libellants, whose claim is repelled by the fact, that she is now a national armed vessel, commissioned by, and in the service of the emperor of France. The evidence of this fact is not controverted. But it is contended, that it constitutes no bar to an inquiry into the validity of the title, by which the emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the jurisdiction of our Courts, has a

right to assert his title in those Courts, unless there be some law taking his case out of the general rule. It is therefore said to be the right, and if it be the right, it is the duty of the Court, to inquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

If the preceding reasoning be correct, the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country. . . .

I am directed to deliver it, as the opinion of the Court, that the sentence of the Circuit Court, reversing the sentence of the District Court, in the case of the Exchange be reversed, and that of the District Court, dismissing the libel, be affirmed.

NOTE.—Accord: The Constitution (1879), L. R. 4 P. D. 39; The Parlement Belge (1878), L. R. 5 P. D. 197. That the exemption is strictly confined to the public ships of a sovereign power is shown by The Charkieh (1873), L. R. 4 Adm. & Ecc. 59, when it was denied to a ship belonging to the Khedive of Egypt who was a subject of the Sultan of Turkey. Public ships are however subject to the local police regulations, Moore, *Digest*, II, 582. A court may adopt suitable means to ascertain whether a vessel purporting to be a public vessel is what she claims to be, Talbot v. Janson (1795), 3 Dallas, 133. As to what is a public ship, see Tucker v. Alexandroff (1901), 183 U. S. 424. As to the status of a military force permitted to march through the country, see Coleman v. Tennessee (1879), 97 U. S. 509, 515. Prisoners on a ship of war are not subjected to the local jurisdiction when a ship puts into a neutral port, L'Invincible (1816), 1 Wheaton, 238, 252. As to asylum on war ships, see *Int. Law Sit. 1902*, 21, Moore, *Digest*, II, 845.

PAPAYANNI AND OTHERS, Appellants v. THE RUSSIAN STEAM NAVIGATION AND TRADING CO., Respondents.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1863.
2 Moore, Privy Council (N. S.), 161.

On an appeal from Her Majesty's Supreme Consular Court, Constantinople.

[The steamer Laconia, belonging to the appellants, a British corporation, collided in the Sea of Marmora with the Colchide,

the property of the respondents, a Russian corporation. As a result the Colchide was lost. Her owners then instituted proceedings against the owners of the Laconia before the British Supreme Consular Court at Constantinople, and by permission of the Russian Government submitted themselves to its jurisdiction. From the decision of that tribunal the present appeal was taken, chiefly on the ground that a British consular court in Turkey had jurisdiction only over suits between British subjects. It appeared in evidence that the corporation styled "The Governor and Company of Merchants of England trading to the Levant Seas," chartered by James I in 1606, had been authorized by Charles II in 1662 to institute consular courts in the Ottoman Dominions for the government of transactions between British merchants therein. These privileges, which were long exercised by the tacit consent of the Ottoman Government, were expressly confirmed by treaty in 1809.]

Their Lordships' judgment was pronounced by DR. LUSHINGTON.

In considering what power and what jurisdiction was conceded to Great Britain within certain portions of the Turkish dominions, it must always be borne in mind that in almost all transactions, whether political or mercantile, a wide difference subsists in the dealings between an Oriental and a Christian State and the intercourse between two Christian nations.

This is an undoubted fact. Many of the reasons are obvious, but this is not the occasion for discussing them. It is sufficient for us to know and acknowledge that such is the fact.

It is true beyond all doubt that, as a matter of right, no State can claim jurisdiction of any kind within the territorial limits of another independent State.

It is also true that between two Christian States all claims for jurisdiction of any kind, or exemption from jurisdiction, must be founded on Treaty, or engagements of similar validity. Such, indeed, were Factory establishments for the benefit of trade.

But though, according to the laws and usages of European nations, a cession of jurisdiction to the subjects of one State within the territory of another, would require, generally at least, the sanction of a Treaty, it may by no means follow that the same strict forms, the same precision of Treaty obligation, would be required or found in intercourse with the Ottoman Porte. . . .

Any mode of proof by which it is shown that a privilege is conceded is, according to the principles of natural justice, sufficient for the purpose. The formality of a Treaty is the best

proof of the consent and acquiescence of parties, but it is not the only proof, nor does it exclude other proof; and more especially in transactions with Oriental States.

Consent may be expressed in various ways; by constant usage permitted and acquiesced in by the authorities of the State, active assent, or silent acquiescence, where there must be full knowledge. . . .

We think, looking at the whole of this case, that so far as the Ottoman Government is concerned, it is sufficiently shown that they have acquiesced in allowing to the British Government a jurisdiction, whatsoever be its peculiar kind, between British subjects and the subjects of other Christian States.

It appears to us that the course was this: that at first, from the total difference of religious habits and feelings, it was necessary to withdraw as far as practicable British subjects from the native Courts; then in the progress of time commerce increasing, and various nations having the same interest in abstaining from resort to the Tribunals of Mussulmans, &c., recourse was had to Consular Courts; and by degrees the system became general.

Of all this the Government of the Ottoman Porte must have been cognizant, and their long acquiescence proves consent. . . .

Though the Ottoman Porte could give and has given to the Christian Powers of Europe authority to administer justice to their own subjects according to their own laws, it neither has professed to give nor could give to one such Power any jurisdiction over the subjects of another Power. But it has left those Powers at liberty to deal with each other as they may think fit, and if the subjects of one country desire to resort to the Tribunals of another, there can be no objection to their doing so with the consent of their own Sovereign and that of the Sovereign to whose Tribunals they resort. . . .

The general right of the Consular Court to entertain the suit under these circumstances is perfectly clear, and to throw any doubt upon it would be to subvert all the principles upon which justice is administered amongst the subjects of Christian Powers in this and other countries of the East.

NOTE.—The organ through which states most commonly exercise their rights of jurisdiction in other countries is the consul. The functions of this officer have had a curious development which has been much misrepresented, especially in important judicial decisions concerning his powers. Until late in the Middle Ages law was thought of as personal rather than territorial. Wherever men went, their system of law, like their citizenship or allegiance, went with them. In consequence when European merchants

established themselves in the Levant and asked the consent of the local sovereign to appoint for themselves judges who would settle their controversies according to their own laws, the arrangement seemed entirely natural to both parties. The judge thus appointed by the merchants was usually called a consul. As early as 1060 the Greek emperor at Constantinople accorded this right to the Venetian merchants. In 1199, the Emperor Alexis III by his Bulla Aurea gave to the Venetian consuls the extraordinary right of deciding controversies not only between Venetians but also between Venetians and his own subjects. Such arrangements were not confined to the Levant. The Crusades were followed by an enormous expansion of commerce, and the Italian merchants who established themselves along the Baltic, in the Netherlands and in London, appointed consuls who exercised both a civil and a criminal jurisdiction. When their interests required it, the merchants of other countries adopted the same system, and in the fifteenth century English consuls who acted as judges were established in Sweden, Norway, Denmark, the Netherlands and Italy. As the city state of the Middle Ages declined and the new kingdoms grew up two changes took place which revolutionized the office of consul. Law came to be looked upon as territorial rather than personal, and the consuls came to be government officials chosen by their governments and not by the merchants over whom they were to exercise jurisdiction. In consequence of the placing of law upon a territorial basis, states looked upon the presence of alien tribunals in their midst as in derogation of their dignity and an impairment of their sovereignty. Hence the consul was deprived of his judicial character in all countries except those in which there was some special reason for maintaining it. At first all the countries where such a jurisdiction was retained were Mohammedan states, and their view that the blessings of Moslem jurisprudence were not for infidels assisted the states of Europe to retain their consular jurisdiction in the lands of the Prophet. Their jurisdiction at first rested on nothing more substantial than the tacit acquiescence of the Mohammedan princes, but was later explicitly confirmed and defined by a series of treaties known as the Capitulations. As to the jurisdiction exercised by American consuls in Turkey, the Court of Claims said in Dainese v. United States (1879), 15 Ct. Cl. 64:

> The usage that Franks, while in Turkey, shall be under the jurisdiction of their respective ministers or consuls is a part of the international law of Europe; and it is therefore a part of the public law of the United States, derived from the common law (of which international law is a part), and not dependent upon treaty, that American consuls in Mohammedan countries exercise judicial powers.

In all countries where the principle of exterritoriality has been applied in recent years, except only Turkey, the jurisdiction claimed was the subject of an express grant by treaty. All such grants were made after the conception of law as territorial had been fully accepted by all members of the family of nations, and were therefore admittedly in derogation of the sovereignty of the states making the grants. Since a consul in such countries may exercise only that jurisdiction which the treaty confers, he is found in practice to have a much narrower jurisdiction than do the consuls in Turkey, many of whose powers are derived only from ancient use.

Consular jurisdiction may be terminated (1) by treaty, as in the case of Japan; (2) by the leasing of the districts concerned, as in the case of Port Arthur, Wei-hai-Wei and Kiao-chau in China which were leased respectively by Russia, Great Britain, and Germany; (3) by annexation, as in the case of the annexation of Madagascar by France and of Tripoli by Italy.

The countries in which the question of consular jurisdiction is now of most importance are China, Siam, Persia and Morocco.

While the law applied in a consular court is the law of the consul's country, it is applied to the settlement of the instant case because it has been adopted for cases of that kind by the territorial sovereign and hence becomes his law, Imperial Japanese Government v. P. & O. Co., L. R. [1895] A. C. 644. A foreign consul may not set up a court in the United States without express authority from the American Government so to do, Glass v. The Betsey (1794), 3 Dallas, 6. Other important cases dealing with the general subject are The Indian Chief (1800), 3 C. Robinson, 12; Dainese v. Hale (1875), 91 U. S. 13; In re Ross (1891), 140 U. S. 453; Dainese v. United States (1879), 15 Ct. Cl. 64. The provisions in the treaties made by the United States are collected in Moore, *Extradition*, I, 100, *n.* 5. See also J. C. Bancroft Davis' notes to *Treaties and Conventions between the United States and Other Powers, 1776-1887;* Borchard, 359; Brown, *Foreigners in Turkey;* Hall, *The Foreign Powers and Jurisdiction of the British Crown;* Jenkyns, *British Rule and Jurisdiction beyond the Seas;* Hinckley, *American Consular Jurisdiction in the Orient;* Hishida, *The International Position of Japan as a Great Power;* Dr. Wellington Koo (now His Excellency, the Chinese Minister in Washington), *The Status of Aliens in China;* Moore, *Digest*, II, 593 seq. The meaning and use of the terms "exterritorial" and "extraterritorial" are discussed in Bonfils (Fauchille), 203, and Piggott, *Exterritoriality*, 7. The latter is the best single volume on the subject with which it deals.

PARKINSON v. POTTER.

QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE OF GREAT BRITAIN.
1885.
Law Reports, 16 Q. B. D. 152.

Appeal from the Westminster County Court.

WILLS, J. The plaintiff in this case sues the defendant for parochial rates which he has paid, and which he contends he is entitled to be repaid by virtue of the defendant's covenant with him. The plaintiff is the owner and the defendant the lessee of a house, in respect of the occupation of which the rates were assessed. The defendant has assigned or sublet to Senhor Pinto de Basto, who is said to be an attaché of the Portuguese embassy and who has on that ground refused to pay them. Under a local

act the landlord is liable in such a case; and the first question that arises is whether the person in question was entitled to the immunity which he has claimed.

The evidence that Senhor Pinto de Basto is an attaché to the Portuguese legation is slight, but I think there is evidence of the fact. . . .

An attaché is a well-known term in the diplomatic service. He forms part of the regular suite of an ambassador. He is classed by Calvo, the author of an elaborate French work on International Law, published in 1880, and written with admirable clearness and with a copiousness of historical illustration which makes his treatise most interesting as well as instructive, along with "Conseillers et Sécrétaires," and he gives a common description of the functions of all three classes of officers as consisting in supporting the minister in all things, in preparing and forwarding official despatches, in carrying out communications by word of mouth with the public administrative authorities of the country to which the minister is accredited, in classifying and keeping charge of the archives of the mission, in ciphering and deciphering despatches, in making minutes of the letters which the minister may have to write, and similar services; and he treats the attaché as undoubtedly entitled to all the immunities accorded to the suite of an ambassador: Calvo, International Law, vol. i., p. 486.

One of these immunities, insisted upon by all writers on International Law with whose works I have any acquaintance, as beyond question, is the complete exemption from the jurisdiction of the Courts of the country to which the minister is accredited. They are all, so far as I have been able to ascertain, equally clear in the opinion that the exemption extends to the family and suite of the ambassador. "This immunity," says Wheaton, "extends not only to the person of the minister but to his family and suite, secretaries of legation and other secretaries, his servants, movable effects, and the house in which he resides": International Law, ed. 1863, p. 394. Again, "the wife and family, servants, and suite of the minister participate in the inviolability attached to his public character": Ibid. 397. For these propositions he quotes Grotius, Bynkershoek, Vattel, and Martens, and he treats these privileges as essential to the dignity of his sovereign and to the duties he is bound to perform. Martens says, "The exemption from civil jurisdiction, contentious and voluntary alike, is general, and belongs to ministers throughout the whole extent of the country in which they reside. They enjoy

it for themselves, for their suite, and for their effects, in as far, be it always understood, as they do not travel out of their diplomatic character''; Guide Diplomatique, vol. i., p. 81. To the same effect is the statement by Calvo: ''The staff of the mission, the wife and family of the diplomatic agent, participate in these prerogatives,'' and amongst the prerogatives there enumerated is that ''he is exempt from the local jurisdiction of the country into which he is sent; no legal process can be brought against him before the tribunals of the place of his residence'': vol. i., p. 381. ''The person who enjoys exterritoriality,'' says the German Bluntschli, ''cannot be subjected to any impost'': International Law Codified, art. 138. ''The family, the staff, the suite, and the servants of him who has the right of exterritoriality,'' says the same writer, ''enjoy the same immunity as himself. His suite have the right but indirectly and on account of him to whom they are attached'': art. 145. ''Such persons are exempt from jurisdiction'': art. 147. ''The immunity of the person exempted extends to the members of his suite'': Heffter, International Law of Europe, sec. 42, VI. These are amongst the most recent French and German authorities upon the subject, and are for the most part subsequent to those cited in the elaborate arguments in Taylor v. Best, 14 C. B. 487, and Magdalena Steam Navigation Co. v. Martin, 2 E. & E. 94; and, so far as I have been able to ascertain, no writer on international law appears to entertain any doubt upon this point.

It was urged for the defendant that there are English authorities conflicting with these propositions. I do not think it is so, if they are carefully considered. It was said that in Fisher v. Begrez, 1 C. & M. 117, it was held that the goods of a chorister to the Bavarian embassy were not privileged from execution under a fi. fa.: but in that case the sheriff had not executed the fi. fa.; nor was the protection of the Court claimed by the ambassador or his servant. The sheriff claimed to be exempt from the duty of levying. The defendant had allowed himself to be sued and the action to proceed to judgment and execution without claiming the privilege, and the sheriff applied to the Court upon affidavits which were quite insufficient to show, and failed to satisfy the Court, that there was any foundation for the allegation that the defendant was then in the service of the Bavarian minister.

In Novello v. Toogood, 1 B. & C. 554, it was held that the goods of a chorister in the service of the Portuguese ambassador were not privileged from distress for poor-rates. But in that

ownership or working of the Intercolonial Railway, but that it is owned, and operated by the King through his government of Canada, for the public purposes of Canada. All income arising from the operation of it is, by the laws of Canada, appropriated to the consolidated revenue fund of Canada, upon which fund all the expenses of the government of Canada are chargeable. All moneys and income due by reason of the operation or business of the railway are chargeable as belonging to the King, and are collectible in his name. . . . The cost of maintenance and operation of this railway is provided for by appropriation of the parliament of Canada out of the consolidated revenue fund, and all the receipts from the working of the railway are a part of the moneys of Canada, appropriated to the consolidated revenue fund, and are not used for the maintenance or operation of the railway, except as the receipts from customs or excise duties or from any other branch of the public service are so used. . . .

The question at once arises whether the court has jurisdiction of a suit which is virtually against the king of a foreign country. An answer in the negative comes almost as quickly.

The general subject of the immunity of the sovereign power from the jurisdiction of its own court was considered and discussed at great length by Mr. Justice Gray, in Briggs v. Lightboats, 11 Allen, 157, and, after an exhaustive review of the authorities, it was held that the action could not be maintained because the lightboats were the property of the United States, a sovereign power. Incidentally the question whether the public property of a foreign sovereign is exempt from the jurisdiction of the courts was discussed, and the cases bearing upon the question were reviewed. In the opinion, on page 186, we find this sentence, which is pertinent to the present case: "The exemption of a public ship of war of a foreign government from the jurisdiction of our courts depends rather upon its public than upon its military character." In Schooner Exchange v. M'Faddon, 7 Cranch, 116, Chief Justice Marshall gives a very clearly reasoned statement of the principles which control the courts in their decisions that they have no jurisdiction over a sovereign of a foreign State who comes within their precincts. The decision was that the courts of the United States had no jurisdiction over a public armed vessel in the service of a sovereign of another country at peace with the United States. At page 137 we find this statement of a reason for the law that governs such cases: "One sovereign being in no respect amen-

able to another; and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him."

The doctrine that the courts have no jurisdiction to proceed with a suit against the sovereign of another State is established in England in numerous decisions. It applies to all proceedings against the public property of such a sovereign. It was clearly laid down and applied in the cases of Wadsworth v. Queen of Spain, 17 Q. B. 171, and DeHaber v. Queen of Portugal, 17 Q. B. 171, 196. It was again applied in The Constitution, L. R. 4 P. D. 39, and also in The Parlement Belge, L. R. 5 P. D. 197, where an elaborate review of the decisions is given by Brett, L. J., who says on page 214: "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

In Vavasseur v. Krupp, 9 Ch. D. 351, 361, Lord Justice Cotton sums up the law as follows: "This court has no jurisdiction, and in my opinion none of the courts in this country have any jurisdiction, to interfere with the property of a foreign sovereign, more especially what we call the public property of the State of which he is sovereign as distinguished from that which may be his own private property. The courts have no jurisdiction to do so, not only because there is no jurisdiction as against the individual, but because there is no jurisdiction as against the foreign country whose property they are, although that foreign country is represented, as all foreign countries having a sovereign are represented, by the individual who is the sovereign." In Young v. The Scotia, [1903] A. C. 501, there is an elaborate discussion of the exemption of public property from

ownership or working of the Intercolonial Railway, but that it is owned, and operated by the King through his government of Canada, for the public purposes of Canada. All income arising from the operation of it is, by the laws of Canada, appropriated to the consolidated revenue fund of Canada, upon which fund all the expenses of the government of Canada are chargeable. All moneys and income due by reason of the operation or business of the railway are chargeable as belonging to the King, and are collectible in his name. . . . The cost of maintenance and operation of this railway is provided for by appropriation of the parliament of Canada out of the consolidated revenue fund, and all the receipts from the working of the railway are a part of the moneys of Canada, appropriated to the consolidated revenue fund, and are not used for the maintenance or operation of the railway, except as the receipts from customs or excise duties or from any other branch of the public service are so used. . . .

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process of the courts of its own sovereignty. The doctrine was applied to a claim for salvage of a public vessel which was used by the Canadian government as a ferry boat, in connection with a line of railway and as a part of the general means of transportation, just as cars are used on the Intercolonial Railway. See also the very recent case of The Jassy, 75 L. J. P. D. & A. 93, where the principle suggested for our guidance was applied to a vessel which was the property of the King of Roumania.

The principles which have long been recognized as applicable to the dealings of all nations with one another, as well as the formal decisions of the courts, make it plain that this action must be dismissed for want of jurisdiction. The plaintiff must seek her remedy in the courts of the country in which she received her injury, where there is a statutory provision for such cases. *Action dismissed.*

NOTE.—Many of the most important cases discussing the exemption of a sovereign from suit in the courts of another state are cited in the principal case. The subject is also discussed in Rothschild v. Queen of Portugal (1839), 3 Younge & Collyer, 594; Munden v. Duke of Brunswick (1847), 10 Q. B. 656; Emperor of Austria v. Day and Kossuth (1861), 2 Giff. 628. "There is no distinction between suits against the government directly, and suits against its property," Stanley v. Schwalby (1893), 147 U. S. 508, 512. A sovereign who begins an action subjects himself to such proceedings by way of defense as may be appropriate to the case, Rothschild v. Queen of Portugal (1839), 3 Younge & Collyer, 594; Strousberg v. Republic of Costa Rica (1881), 44 L. T. 199, but the defense so set up must not be in the nature of an independent action, South African Republic v. La Compagnie Franco-Belge (1898), L. R. 1 Ch. 190. A sovereign may be sued incognito but upon declaring his status the suit must stop, Mighell v. Sultan of Johore (1894), 1 Q. B. 149. See also Bonfils (Fauchille), 423.

NOTE ON AERIAL JURISDICTION.

A new topic in international law which the progress of recent invention has made of much importance is aerial jurisdiction. At least as far back as the reign of Edward I, 1272-1307, the ownership of land has been held in England to extend to an indefinite distance both upward and downward in accordance with the maxim *Cujus est solum ejus usque ad coelum et ad inferos*, Bury v. Pope (1588), Croke, Elizabeth, 118. In Pickering v. Rudd (1815), 4 Campbell, 219, Lord Ellenborough expressed some doubt as to whether this principle still obtained. "It would follow," he said, "that an aeronaut is liable to an action of trespass *quare clausum fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage." Later judges, however, have not allowed themselves to be frightened away from what they regard as an established rule by the prospect of undesirable consequences, and the rule has been applied in numerous cases, e. g. Corbett v. Hill (1870), L. R. 9 Eq. 671; Finchley Electric Light Co. v. Finchley Urban Council (1903), L. R. 1 Ch. Div. 437.

It has also been recognized by many American courts. See Murphy v. Bolger Brothers (1888), 60 Vt. 723; Hannabalson v. Sessions (1902), 116 Iowa, 457; Puoroto v. Chieppa (1905), 78 Conn. 401; Butler v. Frontier Telephone Co. (1906), 186 N. Y. 486. Since the air space is treated as part of the subjacent land, any unpermitted intrusion therein is a trespass, Guille v. Swan (1822), 19 Johnson (N. Y.), 381; Esty v. Baker (1860), 48 Maine, 495; Ellis v. Loftus Iron Co. (1874), L. R. 10 C. P. 10.

The rule of the English common law as to the ownership of land up to the sky became established before the advent of the dirigible airship and the wireless telegraph, when there was no effective means of occupying the adjacent air space except by structures resting upon the earth. If that rule is to be continued, the practical difficulty suggested a hundred years ago by Lord Ellenborough, namely that every aeronaut who passes over a field becomes a trespasser therein, will operate as a serious handicap to the development of the usefulness of air craft. On the other hand the dirigible airship now makes it easy to invade the privacy of the occupant of the land to an extent never before possible, and necessarily endangers his physical safety by objects falling from air craft or by the falling of the air craft themselves. Here is a conflict of interests which in Anglo-American jurisdictions has not yet been reconciled. In other jurisdictions there is a widespread recognition of rights in the air in derogation of the rights of the subjacent proprietor. The Japanese Civil Code, sec. 207, provides:

> The ownership of land, subject to restrictions imposed by law or regulations, extends above and below the surface.

Provisions of a similar kind are found in the Civil Codes of France, Holland, Germany, Austria, Italy, Switzerland, Spain and Portugal.

In international law the question of aerial jurisdiction is as yet without authoritative determination. Among publicists the great weight of authority is in favor of the opinion that whatever the rights of a private owner of land in the air space above his land may be, a state must possess the same jurisdiction over the air space above its territory that it possesses over the territory itself. To admit the contrary would subject the state to dangers that could not be tolerated, and would make impossible the enforcement of some of its laws. For discussions of aerial jurisdiction from the standpoint of international law, see Hazeltine, *The Law of the Air;* Sir H. Erle Richards, *Sovereignty Over the Air*; Nijeholt, *Air Sovereignty*; Meili, *Das drahtlose Telegraphie;* Spaight, *Aircraft in War;* Fauchille, *Le Domain Aérién et le Regime Juridique des Aérostats; La Revue Juridque Internationale de la Locomotion Aérienne,* four volumes; *International Law Situations, 1907,* 138 (wireless telegraph); Ib. *1912,* 56 (aircraft in war); Hershey, *Essentials,* chs. xv and xxviii; Phillipson, *Two Studies in International Law,* 104; Phillipson, *International Law and the Great War,* 314; Wilson, *Handbook,* 87-90, 120-124; Bonfils (Fauchille), 340-347; Baldwin, "The Law of the Air-Ship," *Am. Jour. Int. Law,* IV, 95; Kuhn, "The Beginnings of an Aerial Law," Ib. IV, 109; Wilson, "Aerial Jurisdiction," *Am. Pol. Sci. Rev.,* V, 171; Report of the Aerial Law Committee, *Int. Law Assoc. Reports for 1913-15,* 218. For a valuable judicial discussion of aerial jurisdiction for police purposes, see the opinion of Mr. Justice Holmes in Georgia v. Tennessee Copper Co. (1907), 206 U. S. 230.

CHAPTER V.

THE ACQUISITION AND TRANSFER OF JURISDICTION.

SECTION 1. THE ACQUISITION OF TERRITORY BY DISCOVERY AND OCCUPATION.

JOHNSON AND GRAHAM'S LESSEE v. WILLIAM M'INTOSH.

SUPREME COURT OF THE UNITED STATES. 1823.
8 Wheaton, 543.

Error to the District Court of Illinois.

This was an action of ejectment for lands in the State and District of Illinois, claimed by the plaintiffs under a purchase and conveyance from the Piankeshaw Indians, and by the defendant, under a grant from the United States. It came up upon a case stated, upon which there was a judgment below for the defendant. . . .

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

The plaintiffs in this cause claim the land, in their declaration mentioned, under two grants, purporting to be made, the first in 1773, and the last in 1775, by the chiefs of certain Indian tribes, constituting the Illinois and the Piankeshaw nations; and the question is, whether this title can be recognized in the Courts of the United States?

The facts, as stated in the case argued, show the authority of the chiefs who executed this conveyance, so far as it could be given by their own people; and likewise show, that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.

As the rights of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely upon the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

On the discovery of this immense continent, the nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded;

but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.

Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States, all show that she placed it on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title.

France, also, founded her title to the vast territories she claimed in America on discovery. However conciliatory her conduct to the natives may have been, she still asserted her right of dominion over a great extent of country not actually settled by Frenchmen, and her exclusive right to acquire and dispose of the soil which remained in the occupation of Indians. . . .

The States of Holland also made acquisitions in America, and sustained their right on the common principle adopted by all Europe. . . .

No one of the powers of Europe gave its full assent to this principle, more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to *Christian people*, and to take possession of them in the name of the king of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title.

In this first effort made by the English government to acquire territory on the continent, we perceive a complete recognition

of the principle which has been mentioned. The right of discovery given by this commission is confined to countries "then unknown to all Christian people;" and of these countries Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession notwithstanding the occupancy of the natives, who were heathen, and, at the same time, admitting any prior title of any Christian people who may have made a previous discovery.

Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. . . .

The United States . . . have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our Courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians. . . .

The Court is decidedly of opinion that the plaintiffs do not exhibit a title which can be sustained in the Courts of the United States; and that there is no error in the judgment which was rendered against them in the District Court of Illinois.

Judgment affirmed, with costs.

NOTE.—Mere discovery is not a sufficient basis for the acquisition of jurisdiction over territory. It must be followed by some act of appropriation amounting to assertion of intent to hold the territory in question.

Such an act constitutes occupation. Lord Stowell held that it was impossible for one state to transfer territory to another even by treaty, unless there was also a transfer of possession. In The Fama (1804), 5 C. Robinson, 106, 114, he said:

> It is to be observed then, that all corporeal property depends very much upon occupancy. With respect to the origin of property, this is the Sole foundation, *Quod nullius est ratione naturali occupanti conceditur.* So with regard to transfer also, it is universally held in all systems of jurisprudence, that to consummate the right of property, a person must unite the right of the thing with possession. A question has been made indeed by some writers, whether this necessity proceeds from what they call the natural law of nations, or from that which is only conventional. Grotius seems to consider it as proceeding only from civil institutions. Puffendorf and Pothier go farther. All concur, however, in holding it to be a necessary principle of jurisprudence, that to complete the right of property, the right to the thing and the possession of the thing itself, should be united; or according to the technical expression, borrowed either from the civil law, or as Barbeyrac explains it, from the commentators on the Canon Law, that there should be both the *jus in rem,* and the *jus in re.*—This is the general law of property, and applies, I conceive, no less to the right of territory than to other rights. Even in newly discovered countries, where a title is meant to be established, for the first time, some act of possession is usually done and proclaimed as a notification of the fact. In transfer, surely, where the former rights of others are to be superseded, and extinguished, it cannot be less necessary that such a change should be indicated by some public acts, that all who are deeply interested in the event, as the inhabitants of such settlements, may be informed under whose dominion, and under what laws they are to live. This I conceive to be the general propriety of principle on the subject, and no less applicable to cases of territory than to property of every other description.

On the whole subject see Moore, *Digest,* I, 258, and Bonfils (Fauchille), 352. See also Martin v. Waddell (1842), 16 Peters, 367; Jones v. United States (1890), 137 U. S. 202; Shively v. Bowlby (1894), 152 U. S. 1; Whiton v. Albany Insurance Co. (1871), 109 Mass. 24; Mortimer v. New York Elevated Ry. (1889), 6 N. Y. Supp. 898; Westlake, *Collected Papers,* 158; Moore, *Digest,* I, 258. The doctrine of acquisition by discovery and occupation was involved in the Oregon controversy between Great Britain and the United States. See Twiss, *The Oregon Question;* Moore, *Int. Arb.* I, 196; Moore, *Digest,* I, 457; V, 720.

SECTION 2. THE ACQUISITION OF TERRITORY BY PRESCRIPTION.

STATE OF MARYLAND v. STATE OF WEST VIRGINIA.

SUPREME COURT OF THE UNITED STATES. 1910.
217 U. S. 1.

Original. In Equity.

MR. JUSTICE DAY delivered the opinion of the court. . . .

It is true there has been more or less contention as to the true boundary line between these States. Attempts have been made to settle and adjust the same, some of which we have referred to, and the details of which may be found in the very interesting document to which we have already made reference, the report of the committee of the Maryland Historical Society. In the proposed settlements, for many years, Virginia and West Virginia have consistently adhered to the Fairfax Stone as a starting point for the disputed boundary. When West Virginia passed the act of 1887, ratifying the Michler line, it was upon condition that Virginia titles granted between the Michler line and the old Maryland line should be validated. Maryland, in the act of 1852, recognized the same starting point.

And the fact remains that after the Deakins survey in 1788 the people living along the line generally regarded that line as the boundary line between the States at bar. In the acts of the legislatures of the two States, to which we have already referred, resulting in the survey and running of the Michler line, it is evident from the language used that the purpose was not to establish a new line, but to retrace the old one, and we are strongly inclined to believe that had this been done at that time the controversy would have been settled.

A perusal of the record satisfies us that for many years occupation and conveyance of the lands on the Virginia side has been with reference to the Deakins line as the boundary line. The people have generally accepted it and have adopted it, and the facts in this connection cannot be ignored. In the case of Virginia v. Tennessee, 148 U. S. 503, 522, 523, Mr. Justice Field, speaking for the court, had occasion to make certain comments which are pertinent in this connection, wherein he said:

"Independently of any effect due to the compact as such, a boundary line between States or provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the

parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary. Lord Hardwicke in Penn v. Lord Baltimore, 1 Vesey Sen. 444, 448; Boyd v. Graves, 4 Wheat. 513; Rhode Island v. Massachusetts, 12 Pet. 657, 734; United States v. Stone, 2 Wall. 525, 537; Kellogg v. Smith, 7 Cush. 375, 382; Chenery v. Waltham, 8 Cush. 327; Hunt on Boundaries (3d ed.), 396.

"As said by this court in the recent case of the State of Indiana v. Kentucky, 136 U. S. 479, 510, 'it is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.' In the case of Rhode Island v. Massachusetts, 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies, said: 'Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than a case of disputed boundary.' "

And quoting from Vattel on the Law of Nations to the same effect (Sec. 149, p. 190):

"The tranquillity of the people, the safety of States, the happiness of the human race do not allow that the possessions, empire, and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title."

And adds from Wheaton on International Law (Sec. 164, p. 260):

"The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation; but the constant and approved practice of

nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner, as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the articles or property in question."

And it was said:

"There are also moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to the country, to home and to family, on which is based all that is dearest and most valuable in life."

In Louisiana v. Mississippi, 202 U. S., 1, 53, this court said:

"The question is one of boundary, and this court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both."

An application of these principles cannot permit us to ignore the conduct of the States and the belief of the people concerning the purpose of the boundary line known as the old state, or Deakins, line, and to which their deeds called as the boundary of their farms, in recognition of which they have established their allegiance as citizens of the State of West Virginia, and in accordance to which they have fixed their homes and habitations. . . .

The effect to be given to such facts as long continued possession "gradually ripening into that condition which is in conformity with international order," depends upon the merit of individual cases as they arise. 1 Oppenheim International Law, Sec. 243. In this case we think a right, in its nature prescriptive, has arisen, practically undisturbed for many years, not to be overthrown without doing violence to principles of established right and justice equally binding upon States and individuals. Rhode Island v. Massachusetts, 12 Pet. 657. . . .

NOTE.—See Moore, *Digest*, I, 293, and Ralston, *International Arbitral Law and Procedure*, 270. The doctrine of acquisition by prescription played an important part in the controversies between the United States and Great Britain as to the boundaries of Venezuela and Alaska. See Pitt

Cobbett, *Cases and Opinions*, I, 96, 109. Jurisdiction over the Bay of Conception in Newfoundland and Delaware and Chesapeake Bays is based upon the same principle. See *ante*, p. 71. A military occupation based upon conquest may by long continuance result in a transfer of jurisdiction without a formal treaty to that effect. United States v. Hayward (1815), 2 Gallison, 485. In such a case the title is derived from prescription rather than from conquest.

Section 3. The Acquisition of Territory by Cession or Conquest.

THE AMERICAN INSURANCE COMPANY AND THE OCEAN INSURANCE COMPANY OF NEW YORK, Appellants, v. 356 BALES OF COTTON, DAVID CANTER, Claimant and Appellee.

Am. Ins. Co. vs. Canter.

Supreme Court of the United States. 1828.
1 Peters, 511.

Marshall, C. J., delivered the opinion of the court.

The plaintiffs filed their libel in this cause in the district court of South Carolina, to obtain restitution of 356 bales of cotton, part of the cargo of the ship Point a Petre; which had been insured by them on a voyage from New Orleans to Havre de Grace, in France. The Point a Petre was wrecked on the coast of Florida, the cargo saved by the inhabitants and carried into Key West, where it was sold for the purpose of satisfying the salvors; by virtue of a decree of a court consisting of a notary and five jurors, which was erected by an act of the territorial legislature of Florida. . . .

The cause depends mainly on the question whether the property in the cargo saved was changed by the sale at Key West. . . . Its validity has been denied on the ground that it was ordered by an incompetent tribunal.

The tribunal was constituted by an act of the territorial legislature of Florida, passed on the 4th July, 1823, which is inserted in the record. That act purports to give the power which has been exercised; consequently, the sale is valid, if the territorial legislature was competent to enact the law.

The course which the argument has taken, will require that, in deciding this question, the court should take into view the relation in which Florida stands to the United States.

The constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals, remains in force until altered by the newly created power of the state.

On the 2d of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession contains the following provision: "The inhabitants of the territories which his Catholic majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the federal constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States." 8 Stats. at Large, 252.

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a State. In the meantime, Florida continues to be a territory of the United States, governed by virtue of that clause in the constitution which empowers congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States." . . .

VAN DEVENTER v. HANCKE AND MOSSOP.

SUPREME COURT OF THE TRANSVAAL. 1903.
Transvaal Law Reports [1903] T. S. 401.

[The defendants, burghers of the South African Republic, were living upon their farm in the district of Vryheid, when in the spring of 1901 a British force appeared, to which they were compelled to surrender. They were later removed to Natal. After their removal, certain wool belonging to them, which was stored on the farm, was confiscated by a Boer officer as the property of burghers who had wrongfully and without permission surrendered to the British troops. It was sold at auction and was purchased by the plaintiff. On the return of the defendants from Natal after the cessation of hostilities, they found the wool still on their farm and took possession of it. To compel its delivery or the payment of its value, £218, this action was brought. As bearing upon the decision of the case, it should be noted that Lord Roberts, duly authorized thereto by the Queen, issued a proclamation September 1, 1900, annexing the South African Republic to the British Empire. The war still continued until May 31, 1902, when by the so-called treaty of Vereeniging, the Boer generals agreed to surrender.]

INNES, C. J.: . . . The plaintiff bases his claim upon two grounds. In the first place, he says that the wool in question was confiscated in accordance with the laws and military usages of the late South African Republic, and that it thereby became the property of the Republic. In the second place, he says that even if the confiscation was not in accordance with the laws of the late Republic, still it was done in good faith and under martial law by the officers of the Boer forces, and should on that account be upheld. On one or other of the above grounds he contends that the confiscation was valid, and that his title by purchase from the confiscating authority is a good title.

The first of these grounds assumes the existence of the late Republic in March, 1901; it is based upon certain proceedings of officials of that State acting in their capacity as such, and carrying out its laws. Moreover, the Law upon which reliance is chiefly placed is one passed by the Republican Executive in the month of December, 1900—after the date of the British annexation. Such a position cannot, in my opinion, be maintained in this Court. On the 1st September, 1900, and therefore six months before the transactions now in issue took place, the

territories known as the South African Republic were by Proclamation No. 15 of 1900 annexed to and declared to form part of, Her Majesty's dominions; and power was given to Lord Roberts, then Commander-in-chief in South Africa, to take such measures and make such laws as he might deem necessary for the peace, order, and good government of the said territories. In March, 1901, therefore, this country, including the district of Vryheid, formed part of the British dominions; and this Court cannot recognise any government or any legislative authority within its limits, after that date, other than the authority and the government of the British Crown.

It was argued for the plaintiff that the Annexation Proclamation was premature; that at the time when this wool was confiscated the district of Vryheid was subject to the *de facto* control and administration of the Boer forces; that although the Proclamation purported to annex the territory of the Transvaal to the empire, there had, at the time of the annexation, been no effectual occupation of it as a country, and no subjugation of its people; and that therefore the Republic continued to exist as a State, and its Government was entitled to exercise legislative and administrative functions. It is no doubt correct as a general rule of international law that two circumstances are necessary to create a complete title by conquest: the conqueror must express in some clear manner his intention of adding the territory in question to his dominions, and he must by the exercise of military force demonstrate his power to hold it as part of his own possessions. It is also true that in March, 1901, large portions of the Transvaal, including the district of Vryheid, were neither occupied nor dominated by British troops; but on the contrary were under the *de facto* control of the Boer forces. And if this were a foreign Court engaged in trying a cause in regard to which the question of when the conquest of the Transvaal was complete became relevant to the inquiry, it is possible that points of considerable intricacy and difficulty would present themselves. But those considerations are not present here. This is a Court constituted by the British Crown, exercising powers and discharging functions derived from the Crown. In its dealing with other States, the Crown acts for the whole nation, and such dealings cannot be questioned or set aside by its Courts. They are acts of State into the validity or invalidity, the wisdom or unwisdom of which domestic Courts of law have no jurisdiction to inquire. . . .

Mr. Smuts [counsel for the plaintiff] argued, however, that

the British Government had recognized the continued existence of the South African Republic, or at any rate of its Government, by concluding a treaty of peace with it on the 31st May, 1902; and that this Court, therefore, should also recognise it. I do not so read the Articles of Peace signed at Pretoria. On the contrary, it seems to me that scrupulous care was taken by those who represented the British Government to refrain from any recognition of the South African Republic or its Government, while at the same time they fully recognised the position of certain leaders of a force entitled to all the privileges of belligerents, as being persons with whom it was proper and necessary to treat in regard to the terms upon which that force should lay down its arms. This is clear to my mind from the language used in describing the capacities of the several signatories and the persons they represented, and the body of the document, while referring to the burgher forces and to the burghers in the field, makes no reference whatever to the Government of either of the two Republics.

For the reasons I have indicated, I am of opinion that this Court cannot recognise the existence of the Government of the South African Republic, or the validity of any laws purporting to be passed by that Government after the 1st September, 1900. This conclusion is fatal to the plaintiff's claim as founded upon the first count of the declaration. . . .

Strictly speaking, it would be possible to dispose of the second count upon the same considerations; because the persons who are stated to have confiscated this wool under martial law are described as officers of the late Republic, and the confiscation relied upon would seem to be a confiscation to the Republican Government under an enactment passed after the date of annexation. But I prefer to consider the alternative claim not from that standpoint, but upon the broad grounds on which it was argued at the trial. Briefly stated, the contention of the plaintiff on this part of his case was as follows: Assuming that the confiscation was not in accordance with such Transvaal law as this Court can recognise, still it was the act of the military officers of a force entitled to belligerent rights, and therefore entitled to enforce martial law—at any rate in respect of the persons and property of its own members. The act was done in good faith, and in furtherance of the prosecution of hostilities in which the defendants as well as the plaintiff were engaged; it was done under martial law, and neither the act itself or its consequences should now be questioned by this Court.

It is not easy to define the exact position which the burgher forces of the Transvaal should be held by a British Court to have occupied after the issue of the Annexation Proclamation. At first sight it would seem that considerable assistance might be derived by resort to American precedent. The Southern Confederacy was not during the Civil War recognized as a Government either by the President or by the Courts of the United States. But there is this fundamental distinction between the two cases: the Confederacy, in spite of its power and its strength, in spite of the fact that it dominated vast tracts of country and controlled and governed a very large population, was nevertheless essentially an illegal organization, formed for the purpose of rebelling against the constituted authority of the Union. And the attitude taken up by the Supreme Court of the United States towards the Confederacy and towards all acts done in furtherance of the rebellion was due to that consideration. The position of the burgher forces, on the other hand, was not affected by any such taint of illegality. And yet, from the point of view of a British Court, they were a community or body of men possessing no territory as a State and under no form of government which such a Court could recognise as a legal government. But, as between the two contending armies they enjoyed full belligerent rights. The recognition of such rights is quite consistent with a denial of any claim to sovereignty (see Rose v. Himeley, 4 Cranch, U. S. Reps. at p. 271), and certainly does not imply that the armed organization to which such recognition was accorded could legally make any regulations affecting the rights of British subjects.

The question is whether the leaders of that community could, in furtherance of the common purpose for which it was striving, deal with the property of its members, without their consent, and whether this Court should recognise such dealing or give effect to its consequences. Without deciding the point, I shall for the purposes of this case assume that they could so deal with the property of those over whom they exercised control. But clearly they could exercise such power to no greater extent than would have been possible if there had been no annexation and if the Republican Government had still been in existence at Pretoria. The fact that a hostile power had issued a Proclamation annexing their territory could not give them more power over the burghers than they possessed before. Consequently we must look to those enactments which, whether they all of them were valid laws or not, were regarded by all members of the

burgher forces as having the force of law, in order to see whether the military officers of these forces acted within their rights in confiscating this particular wool—bearing in mind that it was not commandeered for warlike purposes, but was taken from the defendants as a penalty for their alleged offence in having voluntarily surrendered without sufficient cause. . . . [Here follows an examination of the legislation of the South African Republic.]

Assuming that the military authorities of the burgher forces had the same power over the defendants and their property that they would have had in case no Annexation Proclamation had been issued, I still consider that the confiscation was not justified by the martial law under which action purports to have been taken. . . . Judgment should, therefore, be for the defendants, with costs.

MASON, J.: . . . The first point raised by the defence is, that upon the annexation of the Transvaal by Lord Roberts on the 1st September, 1900, the Government of the South African Republic came to an end, and any acts of its officers in opposition to the British Government can receive no recognition by this Court. . . . The Government of the South African Republic after the annexation either ceased to exist or continued as a Government *de facto* or *de jure*. If the former were the case then the confiscation was invalid, and if the latter then that Government is subject to the laws which it made for itself, or at any rate cannot have greater rights than its alleged constitution confers. . . . It is perfectly true that the Boers were throughout substantially recognised as belligerents, but belligerent rights are rights only against the enemy, not rights of the belligerents *inter se*. These are governed by the municipal law of each belligerent (Williams v. Bruffy, 96 U. S. R. 177; Dewing v. Perdicaries, 96 U. S. R. 193; re Venice, 2 Wall. 258). That municipal law may be contained in special statutes or military codes applicable in time of war, or may be comprised under the wider and less defined jurisdiction of martial law as understood in British jurisprudence. It is, I think, quite clear that where there are definite provisions of military law applying to military offences, those provisions exclude the operation of martial law in those particular cases (Planters' Bank v. Union Bank, 16 Wall. 483; Mrs. Alexander's Cotton, 2 Wall. 405). . . . [After an examination of the statutes of the South African Republic, the learned judge continues:] It cannot, I think, be

successfully contended, and indeed was not contended, that the confiscation in the present case can be justified under these Laws, which lay down a method for dealing with offences of the kind charged against the defendants, with a particularity and jealousy not to be wondered at, when every citizen of the State is made subject to military law and service. . . . There ought to be judgment for the defendants, with costs.

BRISTOWE, J.: . . . In September, 1900, Lord Roberts' Proclamation annexing the Transvaal was issued. Mr. Smuts admitted very frankly that the effect of this was to incorporate the territory of the South African Republic in the British dominions. And I think it is necessary to go a step farther and to say, that inasmuch as, according to modern notions at all events, the possession of territory is essential to the existence of a State, the Proclamation taken in connection with the events which subsequently occurred put an end from the moment of its issue to the existence of the Republic as a political unit. We are then brought face to face with the difficult question of what was the legal position of the burgher forces still remaining in the field. Upon this question there is, so far as I know, no authority; and it may be that the position in which the Boer forces were placed by the Annexation Proclamation was one unexampled in history.

Now, in the first place, these forces were the remains of the fighting force of the South African Republic. There was, as it seems to me, no question of according to them belligerent rights. They were enemies who still remained unconquered. In the second place, they were a community of persons, bound together by ties of blood, actuated by a common purpose, and capable of contracting. So much was admitted by the treaty of Vereeniging, which on the face of it was an agreement between the British Government, on the one hand, and the outstanding burghers acting through their representatives on the other. Moreover, the treaty of Vereeniging recognized them as having a *de facto* Government, for their representatives were described as "acting as the Government of the South African Republic." Indeed, the recognition of their existence as a community involves, as it seems to me, an admission that they had some form of organization or constitution, and that there were certain laws by which they were bound *inter se*.

What, then, was this constitution and what were these laws? Two views were suggested. One is that the outstanding burgher

forces carried with them into their exile (if I may be allowed the expression) the laws of their late State, so far as such laws were necessary or applicable to their existence as a military community. The other is, that by some sort of implied agreement or by common consent they became subject to martial law, namely, the expression of the will of their military commanders.

Of these two views the former appears to be the sounder, and I hold that the laws by which the remnant of the Boer forces were bound *inter se* were those of their old State, so far as they were applicable to the military organization, which was all that then remained. . . . These laws contained no provision authorizing such a confiscation of private property as occurred in the present case. . . . It seems to me that this action fails and must be dismissed, with costs.

NOTE.—Compare Lemkuhl v. Kock (1903), Transvaal L. R. [1903] T. S. 451. On the subject of conquest see Campbell v. Hall (1774), Cowper, 204; Westlake, *Collected Papers*, 475; Moore, *Digest*, I, 290. Bonfils (Fauchille), sec. 534, argues that conquest does not confer a valid title. "Taking possession by violence is merely a brutal fact."

CHAPTER VI.

EFFECTS OF THE TRANSFER OF JURISDICTION.

SECTION 1. EFFECT ON PUBLIC AND PRIVATE LAW.

THE PHILIPPINE SUGAR ESTATES DEVELOPMENT COMPANY (LIMITED) v. THE UNITED STATES.

COURT OF CLAIMS OF THE UNITED STATES. 1904.
39 Ct. Cl. 225.

[The claimant, a corporation chartered at Manila in the Philippine Islands in 1900 in accordance with the provisions of the Spanish law in force in the Islands prior to their cession to the United States, sues for the rent of its premises which had been taken for the use of the American troops. Such rent had not been paid because question had been raised as to the true ownership of the property.]

HARVEY, J., delivered the opinion of the court. . . .

A more serious question is presented in considering the competency of the local authorities to create the plaintiff a corporation. If that authority did not exist, then plaintiff acquired no legal existence and has none now.

The company was organized under the Spanish law claimed by plaintiff to be in force in the Philippine Islands after the treaty of Paris. Articles incorporating plaintiff were executed in January, 1900, and were duly recorded in the Mercantile Registry of Manila soon thereafter. The treaty which ceded the islands to the United States was signed December 10, 1898, and ratified the following April. During this time Manila was under the military control of the United States, and the municipal law of the place was administered and enforced by the military government, except as modified by the military authorities. When the treaty ceding the islands was ratified the sovereignty of the United States became absolute. Translations of the laws

then in force in the ceded territory were published and issued by authority of the Secretary of War. This included the civil code and the code of commerce, which regulated rights of property and prescribed rules for commercial transactions and embraced the rules under which commercial associations are formed and regulated. The translation recited that the code of commerce was in force. (Division of Customs and Insular Affairs, October, 1899.) Some changes were subsequently made (laws of Philippine Commission, 1901), as, for example, the repeal of a chapter of the code (p. 132), but no changes affecting the methods of incorporating companies had been made at the time of the incorporation of this association.

If, at the time of the cession of the archipelago, only such laws were continued in force as did not involve a sovereign grant—the right to any kind of a charter under local regulations being included—as contended by the defendants upon the eminent authority of the late civil governor of the ceded territory, then the laws granting corporate rights became entirely inoperative after the cession and a check was immediately and indefinitely put upon the formation of partnerships, general and limited, the organization of joint stock companies and associations of different kinds incident to the commercial and industrial life of the ceded country and as necessary there as in other parts of the world.

The general rule of international law in regard to all conquered or ceded territory is that the old laws continue until repealed by the proper authorities. (Woolsey's Int. Law, sec. 161.)

In conquered or ceded countries that have already laws of their own, the king may alter and change those laws; but till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, and in the case of an infidel country. (1 Blackstone, 107, Lewis's ed.)

In Chew v. Calvert it was held that the laws of Spain continued in force in Mississippi until after the territorial government was organized under act of Congress April 7, 1798. (1 Walk., Miss R., 56.)

In Norris v. Harris (15 Cal., 253) it was held that the presumption that the common law prevails in those States originally colonies of England does not extend to States like Florida, Louisiana, and Texas, where organized governments existed at the time of their accession to the country, which laws remained in force until abrogated and new laws promulgated.

In Am. Ins. Co. v. Canter (1 Pet., 511), while discussing the effect of the cession of territory by treaty, Chief Justice Marshall said:

"On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State." . . .

Special privileges, grants, or franchises flowing from the grace and pleasure of the sovereign in favor of some one particular person or body distinguished from the general body of the inhabitants are the things forbidden. It needs no reference to international law to say that any exercise of authority by the ceding sovereignty, after cession, could not have force with reference to such things as grants of land, or the bestowal of special franchises, such as the construction of roads, the keeping of ferries, and the erection of bridges with the right to collect toll upon them. These are grants by the authority of the State as particular privileges which look to the promotion and protection of the public good. But the municipal laws promulgated during the time the ceding authority existed and which are generally recognized as necessary to the peace and good order of the community remained in full force and effect. Any other rule would hold in abeyance civil functions with respect to the use, enjoyment, and transfer of private property that would lead to results harmful to the inhabitants of the ceded territory and injurious to the best interests and authority of the new sovereign as well. This is something that has not been tolerated in modern times.

During the military occupation, and while a state of war yet existed between the two countries, the United States expressly recognized the continuance of the municipal laws of the conquered territory. The military occupancy, though absolute and supreme, operated only upon the political conditions of the people without affecting private rights of person and property. Under these municipal laws partnerships were formed and joint-stock associations organized, and the ordinary and commercial transactions of the country proceeded, as nearly alike

as the changed conditions would admit, as before. And after peace was declared the authority of the United States was directed to be exerted for the security of the persons and property of the people of the islands and for the confirmation of all their private rights and relations. The municipal laws of the territories in respect to these private rights and property were to be considered as continuing in force, to be administered by the ordinary tribunals as far as practicable. (Presidents' Messages, 10 Richardson, 209, 220.)

This action of the Government merely emphasized the distinction existing between the municipal laws, which regulated and protected the relations of the many, and the power of the sovereign, which only could grant franchises and special privileges to the few. Such distinction was indicated in the local law classifying judicial persons into corporations, associations, and institutions of public interest, and associations of private interest, civil, commercial, or industrial. (Art. 35, Civil Code.) Pursuant to which it was provided that the civil capacity of corporations should be governed by the laws creating or recognizing them—that is to say, by their charters or gifts of franchises—while the civil capacity of private associations was to be determined by their by-laws. (Art. 38, id.)

The things prohibited were grants or concessions of public or corporate rights or franchises for the construction of public or quasi public works, such as railroads, tramways, telegraph and telephone lines, waterworks, gas works, electric light lines, etc. (Executive order of December 22, 1898, id. 221.)

Independent of all these considerations plaintiff was a *de facto* association with the right of possession and the right to give lawful discharge for the use and occupation of its property. Governor Taft recognized this, going so far as to say that plaintiff could probably hold title, or, in any event, payment to it would be a complete defense to any claim made by the Dominican friars, because their dealings with the corporation would be held to estop them from denying its corporate existence. (Off. Letter to the Maj. Gen., Com. Div. of the Philippines, March 16, 1903.) We are unable to see why plaintiff's collection of the rent due to it as an association would not be a lawful acquittance of any claim against the occupants of the property. The incorporation was compatible with the new order of things. The association was given life by the same municipal law that was authorized to create either a general or a limited partnership. This law we have seen was neither abro-

gated nor impaired by the change of government. No other person or association of persons could rightfully claim the rental value, and payment to this company does not put the Government in danger of paying twice. It is true that if plaintiff had been dispossessed the new occupants could set up against a claim for rent an outstanding title in another, because that would not preclude the occupants from showing a better outstanding title. But this defendants have not done and do not propose to do further than to say that the real parties in interest are the friars, who are not claiming. . . . Judgment will be entered for plaintiff.

ALVAREZ Y SANCHEZ v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1910.
216 U. S. 167.

Appeal from the Court of Claims.

[In 1878 the claimant Sanchez purchased for a valuable consideration the office known as "Numbered Procurador [Solicitor] of the Courts of First Instance of the capital of Porto Rico" in perpetuity, and received from the Governor General of Porto Rico a patent which was confirmed in 1881 by a patent from the King of Spain. Porto Rico having been ceded to the United States, the American Military Governor on April 30, 1900, issued a decree abolishing the office of procurador. This decree was ratified by Congress. Sanchez then filed a complaint in the Court of Claims for the purpose of recovering from the United States the value of the office on the ground that its abolition deprived him of property contrary to article 7 of the treaty of peace between the United States and Spain which provided that the cession should not "in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds." The complaint was held bad on demurrer and the claimant appealed.]

MR. JUSTICE HARLAN delivered the opinion of the court. . . .

We do not think that the present claim is covered by the Treaty. . . . The words in the Treaty "property . . . of private individuals," evidently referred to ordinary, private property, of present, ascertainable value and capable of being transferred between man and man.

When the United States, in the progress of the war with Spain, took firm, military possession of Porto Rico, and the sovereignty of Spain over that Island and its inhabitants and their property was displaced, the United States, the new Sovereign, found that some persons claimed to have purchased, to hold in perpetuity, and to be entitled, without regard to the public will, to discharge the duties of certain offices or positions which were not strictly private positions in which the public had no interest. They were offices of a quasi-public nature, in that the incumbents were officers of court, and in a material sense connected with the administration of justice in tribunals created by government for the benefit of the public. It is inconceivable that the United States, when it agreed in the Treaty not to impair the property or rights of private individuals, intended to recognize, or to feel itself bound to recognize, the salability of such positions in perpetuity, or to so restrict its sovereign authority that it could not, consistently with the Treaty, abolish a system that was entirely foreign to the conceptions of the American people, and inconsistent with the spirit of our institutions. . . . If, originally, the claimant lawfully purchased, in perpetuity, the office of Solicitor (Procurador) and held it when Porto Rico was acquired by the United States, he acquired and held it subject, necessarily, to the power of the United States to abolish it whenever it conceived that the public interest demanded that to be done. . . . It is clear that the claimant is not entitled to be compensated for his office by the United States because of its exercise of an authority unquestionably possessed by it as the lawful sovereign of the Island and its inhabitants. . . . The judgment of the Court of Claims must be affirmed. It is so ordered.

NOTE.—Accord: O'Reilly de Camara v. Brooke (1908), 209 U. S. 45. For an able adverse comment on this and the principal case, see Bordwell, "Purchasable Offices in Ceded Territory," in *Am. Jour. Int. Law*, III, 119.

VILAS v. CITY OF MANILA.

SUPREME COURT OF THE UNITED STATES. 1911.
220 U. S. 345.

Error to and appeals from the Supreme Court of the Philippine Islands.

MR. JUSTICE LURTON delivered the opinion of the court.

The plaintiffs in error, who were plaintiffs below, are creditors of the city of Manila as it existed before the cession of the

Philippine Islands to the United States by the treaty of Paris, December 10, 1898. Upon the theory that the city under its present charter from the government of the Philippine Islands is the same juristic person and liable upon the obligations of the old city, these actions were brought against it. The Supreme Court of the Philippine Islands denied relief, holding that the present municipality is a totally different corporate entity, and in no way liable for the debts of the Spanish municipality.

The fundamental question is whether, notwithstanding the cession of the Philippine Islands to the United States, followed by a reincorporation of the city, the present municipality is liable for the obligations of the city incurred prior to the cession to the United States. . . .

The city as now incorporated has succeeded to all of the property rights of the old city and to the right to enforce all of its causes of action. There is identity of purpose between the Spanish and American charters and substantial identity of municipal powers. The area and the inhabitants incorporated are substantially the same. But for the change of sovereignty which has occurred under the treaty of Paris, the question of the liability of the city under its new charter for the debts of the old city would seem to be of easy solution. The principal question would therefore seem to be the legal consequence of the cession referred to upon the property rights and civil obligations of the city incurred before the cession. And so the question was made to turn in the court below upon the consequence of a change in sovereignty and a reincorporation of the city by the substituted sovereignty. . . .

The historical continuity of a municipality embracing the inhabitants of the territory now occupied by the city of Manila is impressive. Before the conquest of the Philippine Islands by Spain, Manila existed. The Spaniards found on the spot now occupied a populous and fortified community of Moros. In 1571 they occupied what was then and is now known as Manila, and established it as a municipal corporation. In 1574 there was conferred upon it the title of "Illustrious and ever loyal city of Manila." From time to time there occurred amendments, and, on January 19, 1894, there was reorganization of the city government under a royal decree of that date. Under the charter there was power to incur debts for municipal purposes and power to sue and be sued. The obligations here in suit were incurred under the charter referred to, and are obviously obligations strictly within the provision of the munici-

pal power. To pay judgments upon such debts it was the duty of the Ayuntamiento of Manila, which was the corporate name of the old city, to make provision in its budget.

The contention that the liability of the city upon such obligations was destroyed by a mere change of sovereignty is obviously one which is without a shadow of moral force, and, if true, must result from settled principles of rigid law. While the contracts from which the claims in suit resulted were in progress, war between the United States and Spain ensued. On August 13, 1898, the city was occupied by the forces of this Government and its affairs conducted by military authority. On July 31, 1901, the present incorporating act was passed, and the city since that time has been an autonomous municipality. The charter in force is act 183 of the Philippine Commission and now may be found as chapters 68 to 75 of the Compiled Acts of the Philippine Commission. . . .

The charter contains no reference to the obligations or contracts of the old city.

If we understand the argument against the liability here asserted, it proceeds mainly upon the theory that inasmuch as the predecessor of the present city, the Ayuntamiento of Manila, was a corporate entity created by the Spanish government, when the sovereignty of Spain in the islands was terminated by the treaty of cession, if not by the capitulation of August 13, 1908, the municipality *ipso facto* disappeared for all purposes. This conclusion is reached upon the supposed analogy to the doctrine of principal and agent, the death of the principal ending the agency. So complete is the supposed death and annihilation of a municipal entity by extinction of sovereignty of the creating State that it was said in one of the opinions below that all of the public property of Manila passed to the United States, "for a consideration, which was paid," and that the United States was therefore justified in creating an absolutely new municipality and endowing it with all of the assets of the defunct city, free from any obligation to the creditors of that city. And so the matter was dismissed in the Trigas Case by the Court of First Instance, by the suggestion that "the plaintiff may have a claim against the crown of Spain, which has received from the United States payment for that done by the plaintiff."

We are unable to agree with the argument. It loses sight of the dual character of municipal corporations. They exercise powers which are governmental and powers which are of a

private or business character. In the one character a municipal corporation is a governmental sub-division, and for that purpose exercises by delegation a part of the sovereignty of the State. In the other character it is a mere legal entity or juristic person. In the latter character it stands for the community in the administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred. . . .

In view of the dual character of municipal corporations there is no public reason for presuming their total dissolution as a mere consequence of military occupation or territorial cession. The suspension of such governmental functions as are obviously incompatible with the new political relations thus brought about may be presumed. But no such implication may be reasonably indulged beyond that result.

Such a conclusion is in harmony with the settled principles of public law as declared by this and other courts and expounded by the text books upon the laws of war and international law. Taylor, International Public Law, Sec. 578.

That there is a total abrogation of the former political relations of the inhabitants of the ceded region is obvious. That all laws theretofore in force which are in conflict with the political character, constitution or institutions of the substituted sovereign lose their force, is also plain. Alvarez v. United States, 216 U. S. 167. But it is equally settled in the same public law that that great body of municipal law which regulates private and domestic rights continues in force until abrogated or changed by the new ruler. In Chicago, Rock Island & Pacific Railway Co. v. McGlinn, 114 U. S. 524, 546, it was said:

"It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is

involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed. . . ."

That the United States might, by virtue of its situation under a treaty ceding full title, have utterly extinguished every municipality which it found in existence in the Philippine Islands may be conceded. That it did so in view of the practice of nations to the contrary is not to be presumed and can only be established by cogent evidence. . . .

NOTE.—Accord: Townsend v. Greeley (1867), 5 Wallace, 326; Merryman v. Bourne (1870), 9 Ib. 592; More v. Steinbach (1888), 127 U. S. 70; Los Angeles Farming and Milling Co. v. Los Angeles (1910), 217 U. S. 217, and the cases there cited.

In practice and quite apart from any legal theory, the effect of the transfer of jurisdiction from one country to another depends much upon the size of the population of the district in question. If small it is not likely to be able to preserve its identity, but will be absorbed by the annexing state and will take the latter's system of law. The transfer of jurisdiction may also be followed by such a volume of immigration from the territory of the new sovereign as to alter entirely the character of the original population, and lead to the introduction of a new legal system. A change of this sort occurred in Utah after its transfer from Mexico to the United States, First National Bank v. Kinner (1873), 1 Utah, 100. If the newly acquired lands are entirely without a civilized population, it is the Anglo-American doctrine that British or American citizens occupying such districts take their own law with them, or as expressed by Chief Justice Holt in Blankard v. Galdy (1693), 2 Salkeld, 411, "In case of an uninhabited country newly found out by English subjects, all laws in force in England are in force there." In Advocate-General v. Ranee Surnomoye Dossee (1863), 2 Moore, Privy Council Cases (N. S.), 22, the court went a step farther and said:

> When Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws but the sovereignty of their own state; and those who live amongst them

and become members of their community become also partakers of and subject to the same laws.

For the status of the common law in Massachusetts see the opinion of Chief Justice Shaw in Commonwealth v. Chapman (1847), 13 Metcalf (Mass.), 68, and for its introduction into Oklahoma see McKennon v. Winn (1893), 1 Ok. 327. For the conflict between the Dutch and the English law after the cession of New York to the English, see Mortimer v. New York Elevated Railroad Co. (1889), 6 N. Y. Supp. 898.

Upon the transfer of jurisdiction the new sovereign succeeds to all the rights of his predecessor, but he takes subject to the limitations of his own constitution. The ceding government cannot increase the powers of another government by purporting to convey to it powers which it cannot constitutionally exercise, New Orleans v. United States (1836), 10 Peters, 662; Pollard v. Hagan (1845), 3 Howard, 212. Any provision of the local law which is repugnant to the law of the new sovereignty may be nullified by the transfer of jurisdiction. Hence on the cession of Minorca to Great Britain, it was held that torture, which was authorized by the old law, could not be inflicted by the British governor, Fabrigas v. Mostyn (1773), 20 State Trials, 181. The transfer may create a situation which necessarily renders certain laws inoperative. Thus on the cession of Texas to the United States, the incompetency of an American citizen to hold land in Texas because of alienage ceased to exist, Osterman v. Baldwin (1868), 6 Wallace, 116. The laws of the ceding state regulating the disposition of the public domain or the discharge of governmental functions in the ceded territory depart with the authority from which they emanated, Harcourt v. Gailliard (1827), 12 Wheaton, 523; United States v. Vallejo (1862), 1 Black, 541; More v. Steinbach (1888), 127 U. S. 70; Ely's Administrator v. United States (1898), 171 U. S. 220.

The transfer of jurisdiction does not in itself alter the local laws which are in force in the ceded territory except in so far as they are in conflict with the laws or institutions of the new sovereign, Campbell v. Hall (1774), Cowper, 204; Picton's Case (1804-1812), 30 State Trials, 226, 944; Strother v. Lucas (1838), 12 Peters, 410; Leitensdorfer v. Webb (1858), 20 Howard, 176; Barnett v. Barnett (1897), 9 New Mexico, 205, 211. On the whole subject see Moore, *Digest*, I, 304-311, 332-334.

Section 2. Effect on Public Rights and Obligations.

UNITED STATES OF AMERICA v. PRIOLEAU.

Courts of Chancery of Great Britain. 1865.
35 Law Journal, Chancery, N. S. 7.

[The government of the Confederate States owned certain cotton which it consigned to the defendant Prioleau and others, at Liverpool, authorizing them to sell it, and recoup themselves for certain charges out of the proceeds. Upon the downfall of

the Confederacy the United States filed a bill praying to have the cotton, then in Liverpool, delivered up to it, and for an injunction and a receiver. The defendants proved a lien upon the cotton for £20,000.]

Wood, V. C.—There are one or two points which, I think, are tolerably clear in this case. The first point is with reference to the right of the United States of America, at this moment, to the cotton, subject to the agreement. I treat it first in that way. It has scarcely been disputed on the present argument, and could hardly be disputed at any further stage of the inquiry, that the right is clear and distinct, because the cotton in question is the admitted result of funds raised by a *de facto* government, exercising authority in what were called the Confederate States of America; that is to say, several of those States which, in union, formerly constituted the United States, and which now, in fact, constitute them; and that *de facto* government, exercising its powers over a considerable number of States (more than one would be quite enough), raises money—be it by voluntary contribution, or be it by taxation, is not of much importance. The defendant Prioleau, in cross-examination, admits that they exercised considerable power of taxation; and with those means, and claiming to exercise that authority, they obtained from several of the States of America funds, by which they purchased this cotton for the use of the *de facto* government. That being so, and that *de facto* government being displaced, I apprehend it is quite clear that the United States of America (that is to say, the government which has been successful in displacing the *de facto* government, and whose authority was usurped or displaced, or whatever term you may choose to apply to it), the authority being restored, stand, in reference to this cotton, in the position of those who have acquired, on behalf of the citizens of the United States, a public property; because otherwise, as has been well said, there would be no body who could sue in respect of, or deal with property that has been raised, not by contribution of any one sovereign state (which might raise a question, owing to the peculiar constitution of the Union, if it had been raised in Virginia or Texas, or in any given State), but the cotton is the product of levies, voluntary or otherwise, on the members of the several States which have united themselves into the Confederate States of America, and which are now under the control of the present plaintiffs, and are represented, for all

purposes, by the present plaintiffs. That being so, the right of the present plaintiffs to this cotton, subject to this agreement is, I think, clear, because the agreement is an agreement purporting to be made on behalf of the then *de facto* existing government, and not of any other persons. That case of The King of the Two Sicilies [1 Sim. N. S. 301] and the case of The King of Spain, [1 Dow. & Cl. 169], and other cases of the same kind, which it is not necessary to go through, show that whenever a government *de facto* has obtained the possession of property, as a government, and for the purposes of the government *de facto,* the government which displaces it succeeds to all the rights of the former government, and, among other things, succeeds to the property they have so acquired.

Now I come to the second head of the question, and I confess at this moment, as at present advised . . . I do not feel much doubt on the subject, namely, the question whether or not, taking this property, they must or must not take it subject to the agreement. It appears to me, at present, they must take it subject to the agreement. It is an agreement entered into by a *de facto* government, treating with persons who have a perfect right to deal with them. I apprehend if they had been American subjects they might do so. One of them, Prioleau, is not an American subject (at least I have no evidence that he is); he is a naturalized British subject; he would have a perfect right to deal with a *de facto* government; and it cannot be compared with any one of those cases Mr. Gifford put, of persons taking the property of another with knowledge of the rights of that other. That is a species of argument that cannot be applied to international cases of this description, and for a very good reason; if so, there would be no possibility during the existence of a government *de facto* of any person dealing with that government in any part of the world. The Courts of every country recognize a government *de facto* to this extent, for the purpose of saying—you are established *de facto,* if you are carrying on the course of government, if you are allowed by those whom you affect to govern to levy taxes on them, and they pay those taxes, and contribution is made accordingly, or you are acquiring property, and are at war, having the rights of belligerents, not being treated as mere rebels by persons who say they are the authorized government of the country. Other nations can have nothing to do with that matter. They say we are bound to protect our subjects who treat with the existing government; and we must give to those subjects, in our country,

every right which the government *de facto* can give to them, and must not allow the succeeding government to assert any right as against the contracts which have been entered into by the government *de facto;* but, as expressed by Lord Cranworth in the case referred to, they must succeed in every respect to the property as they find it, and subject to all the conditions and liabilities to which it is subject and by which they are bound. Otherwise, I do not see any answer to Mr. James's illustration, and I do not see why there should not have been a bill filed to have the Alabama delivered up; . . . because on the theory of the present plaintiffs, it was their property just as much as their cotton is now. If the case had been this (and it is the only case I can consider as making any difference, but that difference would be fatal to the plaintiffs' case in another point of view): if they had been a set of marauders, a set of robbers (as was said to be the case in the kingdom of Naples, truly or untruly), devastating the country, and acquiring property in that way, and then affecting to deal with your subjects in England, it would not be the United States, but the individuals who had been robbed and suffered, who could come as plaintiffs. That would be fatal to the claim of the United States as plaintiffs. The United States could only come to claim this because it has been raised by public contribution; and although the United States, who are now the government *de facto* and *de jure,* claim it as public property, yet it would not be public property unless it was raised, as I have said, by exercising the rights of government, and not by means of mere robbery and violence.

I confess, therefore, I have so little doubt, that this agreement is one that would be binding on the plaintiffs, that I cannot act against these gentlemen without securing to them the reasonable benefit of this agreement; and I cannot put them under any terms which would exclude them from the reasonable benefit of what they are entitled to, and must be held entitled to, as I think, at the hearing of the cause. . . .

WEST RAND CENTRAL GOLD MINING COMPANY, LIMITED, v. THE KING.

KING'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE OF GREAT BRITAIN.
1905.
Law Reports [1905] 2 K. B. 391.

[Petition of right which alleged that before the outbreak of the South African War, gold, the produce of a mine in the South

African Republic owned by the suppliants, had been seized by officials of that Republic, which gold or its value, under the laws of the Republic, the government thereof was bound to return. The suppliants contended that by reason of the conquest and annexation of the territories of the Republic by Her late Majesty, Queen Victoria, the obligation of the government thereof towards the suppliant was now binding upon His Majesty the King.]

Lord Alverstone, C. J. In this case the Attorney-General, on behalf of the Crown, demurred to a petition of right presented in the month of June, 1904, by the West Rand Central Gold Mining Company, Limited. . . .

The Attorney-General for the Crown, as well as Lord Robert Cecil for the suppliants, desired that we should deal with the case as if any necessary amendment had been made, and decide the question whether all the contractual obligations of a State annexed by Great Britain upon conquest are imposed as a matter of course, and in default of express reservations, upon Great Britain, and can be enforced by British municipal law against the Crown in the only way known to British municipal law, that is by a petition of right. We have no hesitation in answering this question in the negative, but, inasmuch as it one of great importance, and we have had the advantage of hearing very able argument upon both sides, we think it right to give our reasons in some detail.

Lord Robert Cecil argued that all contractual obligations incurred by a conquered State, before war actually breaks out, pass upon annexation to the conqueror, no matter what was their nature, character, origin, or history. . . . His main proposition was divided into three heads. First, that, by international law, the Sovereign of a conquering State is liable for the obligations of the conquered; secondly, that international law forms part of the law of England; and, thirdly, that rights and obligations, which were binding upon the conquered State, must be protected and can be enforced by the municipal Courts of the conquering State.

In support of his first proposition, Lord Robert Cecil cited passages from various writers on international law. . . . Before, however, dealing with the specific passages in the writings of jurists upon which the suppliants rely, we desire to consider the proposition, that by international law the conquering country is bound to fulfil the obligations of the conquered,

upon principle; and upon principle we think it cannot be sustained. When making peace the conquering Sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely at his option to what extent he will adopt them. It is a case in which the only law is that of military force. This, indeed, was not disputed by counsel for the suppliants; but it was suggested that although the Sovereign when making peace may limit the obligations to be taken over, if he does not do so they are all taken over, and no subsequent limitation can be put upon them. What possible reason can be assigned for such a distinction? Much inquiry may be necessary before it can be ascertained under what circumstances the liabilities were incurred, and what debts should *in foro conscientiae* be assumed. There must also be many contractual liabilities of the conquered State of the very existence of which the superior Power can know nothing, and as to which persons having claims upon the nation about to be vanquished would, if the doctrine contended for were correct, have every temptation to concealment—others, again, which no man in his senses would think of taking over. A case was put in argument which very well might occur. A country has issued obligations to such an amount as wholly to destroy the national credit, and the war, which ends in annexation of the country by another Power, may have been brought about by the very state of insolvency to which the conquered country has been reduced by its own misconduct. Can any valid reason by suggested why the country which has made war and succeeded should take upon itself the liability to pay out of its own resources the debts of the insolvent State, and what difference can it make that in the instrument of annexation or cessation of hostilities matters of this kind are not provided for? We can well understand that, if by public proclamation or by convention the conquering country has promised something that is inconsistent with the repudiation of particular liabilities, good faith should prevent such repudiation. We can see no reason at all why silence should be supposed to be equivalent to a promise of universal novation of existing contracts with the Government of the conquered State. It was suggested that a distinction might be drawn between obligations incurred for the purpose of waging war with the conquering country and those incurred for general State expenditure. What municipal tribunal could determine, according to the laws of evidence to be observed by that tribunal, how par-

ticular sums had been expended, whether borrowed before or during the war? It was this and cognate difficulties which compelled Lord Robert Cecil ultimately to concede that he must contend that the obligation was absolute to take over all debts and contractual obligations incurred before war had been actually declared.

Turning now to the text-writers, we may observe that the proposition we have put forward that the conqueror may impose what terms he thinks fit in respect of the obligations of the territory, and that he alone must be the judge in such a matter, is clearly recognized by Grotius: see "War and Peace," book iii. chap. 8, s. 4, and the Notes to Barbeyrac's edition of 1724, vol. ii. p. 632. For the assertion that a line is to be drawn at the moment of annexation, and that the conquering Sovereign has no right at any later stage to say what obligations he will or will not assume, we venture to think that there is no authority whatever. A doctrine was at one time urged by some of the older writers that to the extent of the assets taken over by the conqueror he ought to satisfy the debts of the conquered State. It is, in our opinion, a mere expression of the ethical views of the writers; but the proposition now contended for is a vast extension even of that doctrine. It has been urged that in numerous cases, both of peace and of cession of territories, special provision has been made for the discharge of obligations by the country accepting the cession or getting the upper hand in war; but, as we have already pointed out, conditions the result of express mutual consent between two nations afford no support to the argument that obligations not expressly provided for are to follow the course, by no means uniform, taken by such treaties. See as to this, s. 27 of the 4th edition of Hall's International Law, and the opinion of Lord Clarendon there cited. Lord Robert Cecil cited a passage from Mr. Hall's book, 4th ed. p. 105, in which he states that the annexing Power is liable for the whole of the debts of the State annexed. It cannot, however, be intended as an exhaustive or unqualified statement of the practice of nations, whatever may have been the opinion of the writer as to what should be done in such cases. It is not, in our opinion, directed to the particular subject now under discussion. The earlier parts of the same chapter contain passages inconsistent with any such view. We would call attention particularly to s. 27 on pp. 98 and 99 of the 4th edition, where the question as to the extent to which obligations do not pass is discussed, and the passages on pp. 101

and 102, referring to the discussion between England and the United States in 1854, in which Lord Clarendon's contention that Mexico did not inherit the obligations or rights of Spain is approved of by Mr. Hall. In the same way the passage from Halleck, s. 25 of chap. 34 (Sir Sherston Baker's edition of 1878), cited by Lord Robert Cecil, cannot be construed as meaning to lay down any such general proposition. It is cited from a chapter in which other sections contain passages inconsistent with the view that the legal obligation to fulfil all contracts passed to the conquering State. The particular section is in fact directed to the obligations of the conquering or annexing State upon the rights of private property of the individual—the point which formed the subject of discussion in the American cases upon which the suppliants replied and with which we shall deal later on. The passage from Wheaton (Atlay's ed. p. 46, s. 30) shows that the writer was only expressing an opinion respecting the duty of a succeeding State with regard to public debts, and, as the note to the passage shows, it is really based upon the fact that many treaties have dealt with such obligations in different ways. We have already pointed out how little value particular stipulations in treaties possess as evidence of that which may be called international common law. We have not had the opportunity of referring to the edition of Calvo, cited by Lord Robert Cecil, but the sections of the 8th book of the edition published in 1872 contain a discussion as to the circumstances under which certain obligations should be undertaken by the conquering State. The distinction between the obligations of the successor with regard to the private property of individuals on the one hand, and the debts of the conquered State on the other, is clearly pointed out, and paragraphs 1005 and 1010 are quite inconsistent with any recognition by the author of the proposition contended for by the suppliants. The same observations apply to Heffter, another work upon which reliance was placed. As regards Max Huber's work on State Succession, published in 1898, there is no doubt, as appears from Mr. Westlake's recent book on international law, published last year, and from other criticisms, that Huber does attempt to press the duty of a succeeding or conquering State to recognize the obligations of its predecessor to a greater extent than previous writers on international law, but the extracts cited by the Attorney-General in his reply and other passages in Huber's book show that even his opinion falls far short of the proposition for which the suppliants contend. But whatever may be the view taken of the opinions of these writers,

they are, in our judgment, inconsistent with the law as recognised for many years in the English Courts; and it is sufficient for us to cite the language of Lord Mansfield in Campbell v. Hall, 1 Cowp. 204, 209, in a passage the authority of which has, so far as we know, never been called in question: "It is left by the Constitution to the King's authority to grant or refuse a capitulation. . . . If he receives the inhabitants under his protection and grants them their property he has a power to fix such terms and conditions as he thinks proper. He is entrusted with making the treaty of peace; he may yield up the conquest or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the King might change part or the whole of the law or political form of government of a conquered dominion." And so, much earlier, in the year 1722 (2nd Peere Williams, p. 75), it is said by the Master of the Rolls to have been determined by the Lords of the Privy Council that "where the King of England conquers a country it is a different consideration, for there the conqueror by saving the lives of the people conquered gains a right and property in such people, in consequence of which he may impose upon them what laws he pleases." References were made to many cases of cession of territory not produced by conquest, and the frequent assumption in such cases of the liabilities of the territory ceded by the State accepting the cession was referred to. They may be dismissed in a sentence. The considerations which applied to peaceable session raise such different questions from those which apply to conquest that it would answer no useful purpose to discuss them in detail. . . . [Their Lordships' opinion on Lord Robert Cecil's second proposition is printed *ante*, p. 15.]

We are of opinion . . . that no right . . . is disclosed by the petition which can be enforced as against His Majesty in this or in any municipal Court; and we therefore allow the demurrer, with costs. *Judgment for the Crown.*

THE EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH COMPANY v. THE UNITED STATES.

COURT OF CLAIMS OF THE UNITED STATES. 1912.
48 Ct. Cl. 33.

PEELE, Ch. J. delivered the opinion of the court: . . .

The petition avers substantially that prior to the War with

Spain the claimant herein, a British corporation, had by separate grants and concessions entered into contracts with the Spanish Government for the construction and operation at its own expense of certain submarine cables and telegraph land lines communicating between the Island of Luzon and certain other islands in the Philippine Archipelago and Hongkong, China, for which the Spanish Government agreed to pay the claimant an annual subsidy of £4,500, payable monthly at Manila by the chief treasury office of those islands.

That prior to December, 1898, the Philippine Archipelago, including the islands referred to, was under the control and sovereignty of the Government of Spain, but by Article III of the treaty of Paris of that date (30 Stat. L., 1754), ceding the Philippine Archipelago to the United States, the control and sovereignty of Spain passed to the control and sovereignty of the United States, who thereupon took possession of said islands and, as averred, assumed "jurisdiction and control over all property and property rights in and upon said Philippine Islands, including the several lines of submarine cable and telegraph land lines established, constructed, and operated by the claimant, and availed itself of all the benefits and advantages thereof, using said lines of cable and telegraph for its governmental and other purposes, which it has continued to do ever since and still continues to do" without the payment of said annual subsidy of £4,500 so theretofore agreed to be paid by the Spanish Government.

By Article VIII of the treaty all buildings, wharves, public highways, forts, and all public property which by law belong to the public domain, and as such to the Crown of Spain, were ceded or relinquished to the United States, for which it is understood $20,000,000 were paid; and it was therein provided that the relinquishment or cession "can not in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of Provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be."

Upon investigation it will be found that the foregoing is the usual stipulation in treaties and is in effect a declaration of the rights of the inhabitants under international law. (United States v. de la Arredondo, 6 Pet., 691, 712.) . . .

In the case of Cessna v. United States (169 U. S., 165, 186) the court observed: "It is the duty of a nation receiving a cession of territory to respect all rights of property as those rights were recognized by the nation making the cession, but it is no part of its duty to right the wrongs which the grantor may have theretofore committed."

This, however, in the absence of a stipulation in the treaty therefor, does not mean that the United States assumed the personal obligations or debts of the Spanish Government to individuals or corporations unless under the rules of international law they thereby became liable. When the United States succeeded to the sovereignty of Spain over the islands they were under no more obligation to continue the contracts for public or private service of individuals or corporations than they were to continue in office officials appointed by the Spanish Government. (Sanchez v. United States, 42 C. Cls, 458; affirmed 216 U. S., 167.)

The cables so constructed under the grants or contracts aforesaid were not public property belonging to the Crown of Spain, and therefore did not pass to the United States by the treaty, but were the private property of the claimant, and, so far as the averments of the petition show, were so recognized by the United States. . . .

It is not averred that the Government seized or took physical possession of the cables or that, as sovereign over the islands, it did other than assume jurisdiction and control over all property and property rights therein, including the submarine cable and telegraph lines of the claimant, using the latter for its governmental and other purposes, for which it made compensation.

There is no averment that the rights of the claimant in and to the ownership and control of its cable and telegraph lines were in any way interrupted or interfered with by the officers of the Government other than for the transmission of messages, for which compensation was made; and if they were, such acts would constitute a tort, over which this court would have no jurisdiction. . . .

The obligation of Spain to the claimant was not the obligation of the Philippine Archipelago, though the Spanish Government saw fit to pay the subsidy out of the revenues of the islands; but if we were to assume that it was, the United States, in the absence of treaty stipulation, such as is referred to in Hall's International Law, sec. 28, p. 104, would not be liable therefor. If we were to assume that the obligations of Spain

to the claimant was a general debt of the Spanish Government, it would be a personal one, as laid down in Hall's International Law, p. 99, note; and being a personal obligation would not in the absence of a treaty stipulation therefor, attach to the United States. . . .

The court is without jurisdiction . . and therefore the demurrer must be sustained, . . and the petition dismissed.

NOTE.—The authorities are in much confusion as to the effect which a transfer of jurisdiction produces upon the rights and obligations of the ceded territory. This is partly because the facts of each cession are likely to present some peculiar features which make it difficult to deduce a general rule. As a result of a transfer of jurisdiction a state may be extinguished, as were Texas and Hawaii when annexed by the United States, and the Boer republics when annexed by Great Britain, and Korea when annexed by Japan; or a district may be transferred the revenues of which have been pledged to the payment of a particular debt, as in the case of parts of Peru annexed by Chili; or the debts may have been contracted by a government which the new sovereign does not consider to have been duly authorized thereto, as in the case of certain debts contracted by the Fiji Islands shortly before their annexation by Great Britain; or the debt may have been contracted for a purpose which the new sovereign does not approve, as in the case of the Cuban debt, much of which had been contracted by Spain for the purpose of subjugating Cuba.

For general discussions of the question, see Borchard, sec. 83; Huber, *Die Staatensuccession*; Appleton, *Des Effets des Annexions de Territoires sur les Dettes de l'État démembré ou annexé;* Westlake, I, 74; Keith, *The Theory of State Succession.* As to the Fijian debt, see Moore, *Digest,* I, 347. As to the Cuban debt and the argument for and against its assumption, see Moore, *Digest,* I, 351. As to the debts of Hawaii, see 22 *Opinions of the Attorney-General,* 584. For the effect of a transfer of jurisdiction on treaties, see Crandall, 425; Moore, *Digest,* V, 341. As to the effect of the annexation of Algiers by France on treaties between Algiers and the United States, see Mahoney v. United States (1869), 10 Wallace, 62.

On the question as to whether a state is bound to recognize the contracts and concessions made by its predecessor in title, see United States of America v. Prioleau (1865), 2 H. & M. 559; United States of America v. McRae (1869), L. R. 8 Eq. 69; Republic of Peru v. Peruvian Guano Co. (1887), 36 Ch. D. 489; Report of the Transvaal Concession Commission, *Blue Book, South Africa,* June, 1901, parts of which are given in Moore, *Digest,* I, 411. As to Spanish concessions in Cuba, Porto Rico, and the Philippines, see Magoon, *Reports,* and the opinions of Attorney-General Griggs in 22 *Opinions of the Attorney-General,* 384, 408, 520, 546, 551, 654, and 23 Ib. 181, 195, 425, 451. Some of these may also be found in Moore, *Digest,* I, 390 *seq.*

As the acquisition of jurisdiction is an act of state, the terms upon which the transfer takes place rest in the discretion of the annexing government and more often than not the transaction presents no justiciable question. Among the many decisions to this effect are Nabob of Carnatic v. East India Co. (1791), 1 Ves. Jr. 371, 2 Ves. Jr. 55; Elphinstone v.

Bedreechund (1830), 1 Knapp, P. C. 316; Secretary of State in Council of India v. Kamachee Boye Sahaba (1859), 7 Moore, Ind. App. 476; Doss v. Secretary of State for India (1875), L. R. 19 Eq. 509; Rustomjee v. The Queen, (1876), 1 Q. B. D. 487, 2 Q. B. D. 69; Cook v. Sprigg (1899), L. R. [1899] A. C. 572.

Section 3. Effect on Private Property.

THE UNITED STATES, Appellants, v. JUAN PERCHEMAN, Appellee.

Supreme Court of the United States. 1833.
7 Peters, 51.

Appeal from the superior court for the eastern district of Florida.

On the 17th of September, 1830, Juan Percheman filed in the clerk's office of the superior court for the eastern district of Florida, a petition, setting forth his claim to a tract of land containing two thousand acres, within the district of East Florida. . . . The petitioner stated that he derived his title to the said tract of land under a grant made to him on the 12th day of December, 1815, by governor Estrada, then Spanish governor of East Florida, and whilst East Florida belonged to Spain. . . . The court . . . adjudged . . . "that the grant is valid, . . . and . . . it is confirmed." The United States appealed to this court.

Mr. Chief Justice Marshall delivered the opinion of the court. . . .

Florida was a colony of Spain, the acquisition of which by the United States was extremely desirable. It was ceded by a treaty concluded between the two powers at Washington, on the 22d day of February, 1819.

The second article contains the cession, and enumerates its objects. The eighth contains stipulations respecting the titles to lands in the ceded territory.

It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private

rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change. It would have remained the same as under the ancient sovereign. The language of the second article conforms to this general principle. "His catholic majesty cedes to the United States in full property and sovereignty, all the territories which belong to him situated to the eastward of the Mississippi, by the name of East and West Florida." A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilized world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property. If this could be doubted, the doubt would be removed by the particular enumeration which follows. "The adjacent islands dependent on said provinces, all public lots and squares, vacant land, public edifices, fortifications, barracks and other buildings which are not private property, archives and documents which relate directly to the property and sovereignty of the said provinces, are included in this article." . . .

This state of things ought to be kept in view when we construe the eighth article of the treaty, and the acts which have been passed by congress for the ascertainment and adjustment of titles acquired under the Spanish government. That article in the English part of it is in these words: "All the grants of land made before the 24th of January, 1818, by his catholic majesty, or by his lawful authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the

said grants would be valid if the territories had remained under the dominion of his catholic majesty."

This article is apparently introduced on the part of Spain, and must be intended to stipulate expressly for that security to private property which the laws and usages of nations would, without express stipulation, have conferred. . . . Without it, the titles of individuals would remain as valid under the new government as they were under the old; and those titles, so far at least as they were consummate, might be asserted in the courts of the United States, independently of this article. . . . *The decree is affirmed.*

NOTE.—Accord: United States v. Arredondo (1832), 6 Peters, 691; Delassus v. United States (1835), 9 Peters, 117; Mitchell v. United States (1835), 9 Ib. 711; Smith v. United States (1836), 10 Ib. 326; Strother v. Lucas (1838), 12 Ib. 410; Doe v. Eslava (1849), 9 Howard, 421; Jones v. McMasters (1857), 20 Ib. 8; Leitensdorfer v. Webb (1858), 20 Ib. 176; United States v. Auguisola (1863), 1 Wallace, 352; United States v. Repentigny (1866), 5 Ib. 211; Coffee v. Groover (1887), 123 U. S. 1.

See Magoon, *Reports*, 177, 194, 305, 351, 374, 541, 650; Moore, *Digest*, I, 414.

While the rights of private property in ceded territory are not affected by the cession, the new sovereign may require the existence and extent of such rights to be proved in a prescribed manner, De la Croix v. Chamberlain (1827), 12 Wheaton, 599, 601; United States v. Clarke (1834), 8 Peters, 436; Chouteau v. Eckhart (1844), 2 Howard, 344, 374; Glenn v. United States (1852), 13 Howard, 250; Tameling v. U. S. Freehold Co. (1877), 93 U. S. 644, 661; Botiller v. Dominguez (1889), 130 U. S. 238; Astiazaran v. Santa Rita Land and Mining Co. (1893), 148 U. S. 80; Ainsa v. New Mexico and Arizona Ry. (1899), 175 U. S. 76; Florida v. Furman (1901), 180 U. S. 402; Barker v. Harvey (1901), 181 U. S. 481.

CHAPTER VII.

THE PACIFIC RELATIONS OF STATES.

Section 1. Treaties and Conventions.

HAVER v. YAKER.

Supreme Court of the United States. 1869.
9 Wallace, 32.

Error to the Court of Appeals of Kentucky.

[Yaker, a Swiss by birth but a naturalized American, died intestate in Kentucky in 1853 seized of certain real estate there. He left a widow, who was a citizen of Kentucky, and certain heirs and next of kin who were citizens of Switzerland. By the laws of Kentucky as they stood in 1853, Yaker's heirs in Switzerland could not inherit the realty, the whole of which would go to the widow. In 1850, a treaty was signed by the United States and Switzerland by the terms of which the heirs claimed the realty. But the treaty had not been ratified and proclaimed until 1855, and the Court of Appeals of Kentucky held that it took effect only when ratified.]

Mr. Justice Davis delivered the opinion of the court.

It is undoubtedly true, as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date (Wheaton's International Law, by Dana, 336, bottom paging). But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications, and this we understand to have been decided by this court, in Arredon-

do's Case, reported in 6th Peters, p. 749. The reason of the rule is apparent. In this country, a treaty is something more than a contract, for the Federal Constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned.

These views dispose of this case, and we are not required to determine whether this treaty, if it had become a law at an earlier date, would have secured the plaintiffs in error the interest which they claim in the real estate left by Yaker at his death. *Judgment affirmed.*

NOTE.—The effect which will be given to a treaty by its signatories is a question of constitutional rather than of international law. In its nature a treaty is a contract between nations and not a measure of legislation. It is a promise rather than a completed act and merely indicates what the parties to it have bound themselves to do. In Great Britain, for instance, a treaty is recognized as an engagement binding in honor upon the government, but the courts cannot enforce it nor protect any rights derived from it until authorized to do so by an act of Parliament; Walker v. Baird (1892), Appeal Cases, 691; The Barenfels (1915), 1 Br. & Col. P. C. 122, 128. If a treaty conflicts with an act of Parliament the statute always prevails, In re Californian Fig Syrup Co.'s Trade-mark (1885), 40 Ch. D. 620, 627-8. In America treaties occupy a wholly exceptional position. They are declared by the Constitution to be a part of the supreme law of the land, and unless by their terms they contemplate further legislative or executive action, they may create rights which a court of competent jurisdiction is under obligation to enforce. Foster and Elam v. Neilson (1829), 2 Peters, 253. In case of conflict between a treaty and a statute, the one later in time prevails, Head Money Cases (1884), 112 U. S. 580. Should Congress enact a law which operated as a repeal of an existing treaty its action would be binding upon the courts, but the responsibility of the United States to the other party to the treaty would not be affected thereby.

On the construction of the most-favored-nation clause which is so commonly found in treaties of commerce, see Crandall, ch. xxiv; Herod, *Favored Nation Treatment;* Moore, *Digest,* V, 257 seq.; Visser, "La Clause de la Nation la plus Favorisée," in *Revue de Droit International,* IV (2nd

Series), 66, 159, 270; Hyde, "Concerning the Interpretation of Treaties," *Am. Jour. Int. Law*, III, 46, 57; Hornbeck, "The Most-Favored-Nation Clause," Ib., III, 395, 619, 797; Bartram v. Robertson (1887), 122 U. S. 116; Whitney v. Robertson (1888), 124 U. S. 190; Taylor v. Morton (1855), 2 Curtis, 454.

On the general subject of treaties see Butler, *The Treaty-Making Power of the United States;* Crandall, *Treaties: Their Making and Enforcement;* Bonfils (Fauchille), 525; and Moore, *Digest,* V, ch. xvii.

CHARLTON v. KELLY, SHERIFF OF HUDSON COUNTY, NEW JERSEY.

SUPREME COURT OF THE UNITED STATES. 1913.
229 U. S. 447.

Appeal from the Circuit Court of the United States for the District of New Jersey.

[Charlton, an American citizen, was arrested in New Jesey upon complaint of the Italian Vice-Consul, who charged him with the commission of a murder in Italy, and demanded his surrender in accordance with the terms of the extradition treaty with the United States. The Penal Code of Italy forbade the surrender of Italian subjects for trial in another country for an offense committed in that country, but provided for their trial in Italy. Charlton contended that the obligations of an extradition treaty are reciprocal and hence that Italy's refusal to surrender her citizens for trial in the country in which their offenses were committed abrogated that clause in the treaty by which the United States agreed to surrender its citizens for trial for offenses committed in Italy.]

MR. JUSTICE LURTON . . . delivered the opinion of the court. . . .

We come now to the contention that by the refusal of Italy to deliver up fugitives of Italian nationality, the treaty has thereby ceased to be of obligation on the United States. The attitude of Italy is indicated by its Penal Code of 1900 which forbids the extradition of citizens, and by the denial in two or more instances to recognize this obligation of the treaty as extending to its citizens. . . .

The attitude of the Italian Government indicated by proffering this request for extradition "in accordance with Article V of the Treaty of 1868" is . . . substantially this,—

First. That crimes committed by an American in a foreign country were not justiciable in the United States, and must, therefore, go unpunished unless the accused be delivered to the country wherein the crime was committed for trial.

Second: Such was not the case with Italy, since under the laws of Italy, crimes committed by its subjects in foreign lands were justiciable in Italy.

Third: That as a consequence of the difference in the municipal law, "it was logical that so far as parity in the matter of extraditing their respective citizens or subjects is concerned, each party should, in the absence of specific provisions in the Convention itself, be guided by the spirit of its own legislation."

This adherence to a view of the obligation of the treaty as not requiring one country to surrender its nationals while it did the other, presented a situation in which the United States might do either of two things, namely: abandon its own interpretation of the word persons as including citizens, or adhere to its own interpretation and surrender the appellant, although the obligation had, as to nationals, ceased to be reciprocal. The United States could not yield its own interpretation of the treaty, since that would have had the most serious consequence on five other treaties in which the word "persons" had been used in its ordinary meaning, as including *all persons,* and, therefore, not exempting citizens. If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no such breach. 7 Kent's Comm., p. 175.

Upon this subject Vattel, page 452, says:

"When the treaty of peace is violated by one of the contracting parties, the other has the option of either declaring the treaty null and void, or allowing it still to subsist; for a contract which contains reciprocal engagements, cannot be binding on him with respect to the party who on his side pays no regard to the same contract. But, if he chooses not to come to a rupture, the treaty remains valid and obligatory."

Grotius says (book 3, ch. 20, par. 38):

"It is honourable, and laudable to maintain a peace even after it has been violated by the other parties: as Scipio did, after the many treacherous acts of the Carthaginians. For no one can release himself from an obligation by acting contrary to his engagements. And though it may be further said that the peace is broken by such an act, yet the breach ought to be taken in favour of the innocent party, if he thinks proper to avail himself of it."

In Moore's International Law Digest. Vol. 5, page 566, it is said:

"A treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the honor and the interests of the governments which are parties to it. If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this judicial tribunals have nothing to do."

In the case of In re Thomas, 12 Blatchf. 370, Mr. Justice Blatchford (then District Judge) said:

"Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture."

In the case of Terlinden v. Ames, 184 U. S. 270, 287, the question was presented whether a treaty was a legal obligation if the state with whom it was made was without power to carry out its obligation. This court quoted with approval the language of Justice Blatchford, set out above, and said (p. 285):

"And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance."

That the political branch of the Government recognizes the treaty obligation as still existing is evidenced by its action in this case. In the memorandum giving the reasons of the De-

partment of State for determining to surrender the appellant, after stating the difference between the two governments as to the interpretation of this clause of the treaty, Mr. Secretary Knox said:

"The question is now for the first time presented as to whether or not the United States is under obligation under treaty to surrender to Italy for trial and punishment citizens of the United States fugitive from the justice of Italy, notwithstanding the interpretation placed upon the treaty by Italy with reference to Italian subjects. In this connection it should be observed that the United States, although, as stated above, consistently contending that the Italian interpretation was not the proper one, has not treated the Italian practice as a breach of the treaty obligation necessarily requiring abrogation, has not abrogated the treaty or taken any step looking thereto, and has, on the contrary, constantly regarded the treaty as in full force and effect and has answered the obligations imposed thereby and has invoked the rights therein granted. It should, moreover, be observed that even though the action of the Italian Government be regarded as a breach of the treaty, the treaty is binding until abrogated, and therefore the treaty not having been abrogated, its provisions are operative against us.

"The question would, therefore, appear to reduce itself to one of interpretation of the meaning of the treaty, the Government of the United States being now for the first time called upon to declare whether it regards the treaty as obliging it to surrender its citizens to Italy, notwithstanding Italy has not and insists it can not surrender its citizens to us. It should be observed, in the first place, that we have always insisted not only with reference to the Italian extradition treaty, but with reference to the other extradition treaties similarly phrased that the word 'persons' includes citizens. We are, therefore, committed to that interpretation. The fact that we have for reasons already given ceased generally to make requisition upon the Government of Italy for the surrender of Italian subjects under the treaty, would not require of necessity that we should, as a matter of logic or law, regard ourselves as free from the obligation of surrendering our citizens, we laboring under no such legal inhibition regarding surrender as operates against the government of Italy. Therefore, since extradition treaties need not be reciprocal, even in the matter of the surrendering of citizens, it would seem entirely sound to consider ourselves as bound to surrender our citizens to Italy even though Italy

should not, by reason of the provisions of her municipal law be able to surrender its citizens to us."

The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition. *Judgment affirmed.*

Section 2. Extradition.

UNITED STATES v. RAUSCHER.

Supreme Court of the United States. 1886.
119 U. S. 407.

Certificate of division of opinion from the Circuit Court of the United States for the Southern District of New York.

[Rauscher, being charged with murder on board an American vessel on the high seas, fled to England, whence he was extradited in accordance with the treaty of 1842. The Circuit Court in which he was tried did not proceed against him for murder, but for a lesser offence not named in the treaty. The judges being divided in opinion as to whether this could be done, the question was certified to the Supreme Court.]

Mr. Justice Miller delivered the opinion of the court. . . .

The treaty with Great Britain, under which the defendant was surrendered by that government to ours upon a charge of murder, is that of August 9, 1842, styled "A treaty to settle and define the boundaries between the territories of the United States and the possessions of Her Britannic Majesty in North America; for the final suppression of the African slave trade; and for the giving up of criminals, fugitive from justice, in certain cases." 8 Stat. 576.

With the exception of this caption, the tenth article of the treaty contains all that relates to the subject of extradition of criminals. That article is here copied, as follows:

"It is agreed that the United States and Her Brittanic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to

justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction or either, shall seek an asylum, or shall be found, within the territories of the other: provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed; and the respective judges and other magistrates of the two Governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper Executive authority, that a warrant may issue for the surrender of such fugitive." . . .

It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the States where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law. . . .

With nearly all the nations of the world with whom our relations are such that fugitives from justice may be found within their dominions or within ours, we have treaties which govern the rights and conduct of the parties in such cases. These treaties are also supplemented by acts of Congress, and both are in their nature exclusive.

The case we have under consideration arises under one of these treaties made between the United States and Great Britain, the country with which, on account of our intimate

relations, the cases requiring extradition are likely to be most numerous. . . .

The treaty itself, in reference to the very matter suggested in the question certified by the judges of the Circuit Court, has been made the subject of diplomatic negotiation between the Executive Department of this country and the government of Great Britain in the cases of Winslow and Lawrence. Winslow, who was charged with forgery in the United States, had taken refuge in England, and, on demand being made for his extradition, the Foreign Office of that country required a preliminary pledge from our government that it would not try him for any other offence than the forgery for which he was demanded. To this Mr. Fish, the Secretary of State, did not accede, and was informed that the reason of the demand on the part of the British government was that one Lawrence, not long previously extradited under the same treaty, had been prosecuted in the courts of this country for a different offence from that for which he had been demanded from Great Britain, and for the trial of which he was delivered up by that government. Mr. Fish defended the right of the government or state in which the offence was committed to try a person extradited under this treaty for any other criminal offence, as well as for the one for which the extradition had been demanded; while Lord Derby, at the head of the Foreign Office in England, construed the treaty as requiring the government which had demanded the extradition of an offender against its laws for a prescribed offence, mentioned in the treaty and in the demand for his extradition, to try him for that offence and for no other. The correspondence is an able one upon both sides, and presents the question which we are now required to decide, as to the construction of the treaty and the effect of the acts of Congress already cited, and of a statute of Great Britain of 1870 on the same subject. The negotiations between the two governments, however, on that subject were inconclusive in any other sense than that Winslow was not delivered up and Lawrence was never actually brought to judgment for any other offence than that for which his extradition was demanded.

. . .

Turning to seek in judicial decisions for authority upon the subject, as might be anticipated we meet with nothing in the English courts of much value, for the reason that treaties made by the Crown of Great Britain with other nations are not in those courts considered as part of the law of the land, but the

rights and the duties growing out of those treaties are looked upon in that country as matters confided wholly for their execution and enforcement to the executive branch of the government. Speaking of the Ashburton treaty of 1842, which we are now construing, Mr. Clarke says, that, "in England the common law being held not to permit the surrender of a criminal, this provision could not come into effect without an Act of Parliament, but in the United States a treaty is as binding as an Act of Congress." Clarke on Extradition, 38. . . .

The treaty of 1842 being, therefore, the supreme law of the land, which the courts are bound to take judicial notice of, and to enforce in any appropriate proceeding the rights of persons growing out of that treaty, we proceed to inquire, in the first place, so far as pertinent to the questions certified by the circuit judges, into the true construction of the treaty. We have already seen that, according to the doctrine of publicists and writers on international law, the country receiving the offender against its laws from another country had no right to proceed against him for any other offence than that for which he had been delivered up. This is a principle which commends itself as an appropriate adjunct to the discretionary exercise of the power of rendition, because it can hardly be supposed that a government which was under no treaty obligation nor any absolute obligation of public duty to seize a person who had found an asylum within its bosom and turn him over to another country for trial, would be willing to do this, unless a case was made of some specific offence of a character which justified the government in depriving the party of his asylum. It is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party. In exercising its discretion, it might be very willing to deliver up offenders against such laws as were essential to the protection of life, liberty, and person, while it would not be willing to do this on account of minor misdemeanors or of a certain class of political offences in which it would have no interest or sympathy. Accordingly, it has been the policy of all governments to grant an asylum to persons who have fled from their homes on account of political disturbances, and who might be there amenable to laws framed with regard to such subjects, and to the personal allegiance of the party. In many of the treaties of extradition between the civilized nations of the world, there is an express

exclusion of the right to demand the extradition of offenders against such laws, and in none of them is this class of offences mentioned as being the foundation of extradition proceedings. Indeed, the enumeration of offences in most of these treaties, and especially in the treaty now under consideration, is so specific, and marked by such a clear line in regard to the magnitude and importance of those offences, that it is impossible to give any other interpretation to it than that of the exclusion of the right of extradition for any others.

It is, therefore, very clear that this treaty did not intend to depart in this respect from the recognized public law which had prevailed in the absence of treaties, and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offences enumerated in the treaty. This is not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject. It is unreasonable to suppose that any demand for rendition framed upon a general representation to the government of the asylum, (if we may use such an expression,) that the party for whom the demand was made was guilty of some violation of the laws of the country which demanded him, without specifying any particular offence with which he was charged, and even without specifying an offence mentioned in the treaty, would receive any serious attention; and yet such is the effect of the construction that the party is properly liable to trial for any other offence than that for which he was demanded, and which is described in the treaty. There would, under that view of the subject, seem to be no need of a description of a specific offence in making the demand. But, so far from this being admissible, the treaty not only provides that the party shall be charged with one of the crimes mentioned, to wit, murder, assault with intent to commit murder, piracy, arson, robbery, forgery, or the utterance of forged paper, but that evidence shall be produced to the judge or magistrate of the country of which such demand is made, of the commission of such an offence, and that this evidence shall be such as according to the law of that country would justify the apprehension and commitment for trial of the person so charged. If the proceedings under which the party is arrested in a country where he is peaceably and quietly living, and to the protection of whose laws he is entitled, are to have no in-

fluence in limiting the prosecution in the country where the offence is charged to have been committed, there is very little use for this particularity in charging a specific offence, requiring that offence to be one mentioned in the treaty, as well as sufficient evidence of the party's guilt to put him upon trial for it. Nor can it be said that, in the exercise of such a delicate power under a treaty so well guarded in every particular, its provisions are obligatory alone on the State which makes the surrender of the fugitive, and that that fugitive passes into the hands of the country which charges him with the offence, free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place. A moment before he is under the protection of a government which has afforded him an asylum from which he can only be taken under a very limited form of procedure, and a moment after he is found in the possession of another sovereignty by virtue of that proceeding, but divested of all the rights which he had the moment before, and all the rights which the law governing that proceeding was intended to secure.

If upon the face of this treaty it could be seen that its sole object was to secure the transfer of an individual from the jurisdiction of one sovereignty to that of another, the argument might be sound; but as this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them. . . .

NOTE.—While the surrender of a fugitive charged with crime may not be demanded as a matter of right under international law, the ease with which individuals can now pass from one jurisdiction to another necessitates some provision for the extradition of such persons. It is probable that the surrender of fugitive criminals will before many years be recognized as a duty on the part of the states where they seek refuge, but at present extradition can be demanded only because of legislation or treaty stipulations. The first extradition statute in the United States was enacted in 1848, while it was not until 1870 that the British Parliament passed an extradition act. Extradition treaties have rapidly increased both in the number negotiated

and in the number of offenses which they cover. The first extradition agreement between England and America was embodied in article 27 of the Jay Treaty of 1794 and covered only two offenses. The present extradition treaties between the two countries, negotiated in 1842, 1890, 1899 and 1907 apply to more than thirty offenses. A country whose municipal law does not prevent may either surrender or expel one charged with an offense that is not extraditable. As to the power to do this in the United States, see the discussion concerning the case of Arguelles, Wheaton (Dana), sec. 115, note 73; Moore, *Extradition*, I, 33. A fugitive from the United States who is brought back by force or fraud from the country in which he has taken refuge can not claim exemption from trial in the jurisdiction where his offense was committed, Ker v. Illinois (1886), 119 U. S. 436. A person extradited under the treaty of 1899 with Great Britain cannot be imprisoned for an offense other than that for which he was extradited even though he had been convicted and sentenced prior to his extradition, Johnson v. Browne (1907), 205 U. S. 309. The meaning of the term describing an offense in a treaty will be determined by the law of the country where the offense was committed, Benson v. McMahon (1880), 127 U. S. 457. If an offender who has been extradited later commits another offense in the country to which he has been surrendered, he may be tried for the second offense before being tried for the offense for which he was extradited, Collins v. O'Neil (1909), 214 U. S. 113. An offender who has been extradited and released on bail pending trial and who goes out of the country and returns voluntarily before the time set for the trial cannot be arrested for another non-extraditable offense until the first one has been disposed of, Cosgrove v. Winney (1899), 174 U. S. 64. The rule of international law that an offender may be tried only for the offense for which he was extradited does not apply to extradition between the States of the American Union, Lascelles v. Georgia (1893), 148 U. S. 537. For a case of surrender under very unusual circumstances see The Case of Savarkar (1911), Wilson, *The Hague Arbitration Cases*, 230, and Scott, *The Hague Court Reports*, 275. On the whole subject of extradition, see Struycken, "Des Droits de l'Individu en Matière d'Extradition," in *27th Report of International Law Association* (1912), 139; Clarke, *Extradition;* Piggott, *Extradition* (chiefly a commentary on the British Extradition Act of 1870); Bentwich, *Leading Cases and Statutes on International Law*, 90 (convenient summary of the British Extradition Act); Moore, *Extradition;* Bonfils (Fauchille), 282; Moore, *Digest*, IV, ch. xiv.

IN RE CASTIONI.

QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE OF GREAT BRITAIN.
1890.
Law Reports [1891] 1 Q. B. 149.

[The prisoner, Castioni, a citizen of the canton of Ticino, Switzerland, together with a number of other citizens of Bellinzona, seized the arsenal in that town, from which they took arms and ammunition, disarmed the gendarmes, and thence marched

upon the municipal palace. Admission having been refused, the crowd forced an entrance, and in the course of the attack, Rossi, a member of the government who was in the palace, was shot and killed by Castioni. There was no evidence that Rossi was known to Castioni. After obtaining possession of the palace, the crowd organized a provisional government which remained in control until overthrown by the troops of the Swiss Republic. Castioni fled to England where he was arrested on the requisition of the Swiss Government, and his extradition demanded on a charge of murder. On an application for a writ of habeas corpus, Castioni argued that his offense was of a political character, and hence was not extraditable within the meaning of the Extradition Act of 1870 and the treaty of extradition between Great Britain and Switzerland, which provided in identical words: "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character."]

DENMAN, J. . . . There has been no legal decision as yet upon the meaning of the words contained in the Act of 1870, upon the true meaning of which this case mainly depends. . . . I do not think it is necessary or desirable that we should attempt to put into language, in the shape of an exhaustive definition, exactly the whole state of things, or every state of things which might bring a particular case within the description of an offence of a political character. I wish, however, to express an opinion as to one matter upon which I entertain a very strong opinion. That is, that if the description given by Mr. John Stuart Mill, ["Any offence committed in the course of or furthering of civil war, insurrection, or political commotion,"] were to be construed in the sense that it really means any act which takes place in the course of a political rising without reference to the object and intention of it, and other circumstances connected with it, I should say that it was a wrong definition and one which could not be legally applied to the words in the Act of Parliament. Sir Charles Russell suggested that "in the course of" was to be read with the words following, "or in furtherance of," and that "in furtherance of" is equivalent to "in the course of." I cannot quite think that this was the intention of the speaker, or is the natural meaning of the expression; but I entirely concur with the observation of the Solicitor-General that in the other sense of the words, if they are not to be construed as merely equivalent expressions, it

would be a wrong definition. I think that in order to bring the case within the words of the Act and to exclude extradition for such an act as murder, which is one of the extradition offences, it must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its hands, before it can be brought within the meaning of the words used in the Act. . . .

It seems to me that it is a question of mixed law and fact—mainly indeed of fact—as to whether the facts are such as to bring the case within the restriction of s. 3, and to show that it was an offence of a political character. I do not think it is disputed, or that now it can be looked upon as in controversy, that there was at this time existing in Ticino a state of things which would certainly show that there was more than a mere small rising of a few people against the law of the State. I think it is clearly made out by the facts of this case, that there was something of a very serious character going on—amounting, I should go so far as to say, in that small community, to a state of war. There was an armed body of men who had seized arms from the arsenal of the State; they were rushing into the municipal council chamber in which the Government of the State used to assemble; they demanded admission; admission was refused; some firing took place; the outer gate was broken down; and I think it also appears perfectly plain from the evidence in the case that Castioni was a person who had been taking part in that movement at a much earlier stage. He was an active party in the movement; he had taken part in the binding of one member of the Government. Some time before he arrived with his pistol in his hand at the seat of government, he had gone with multitudes of men, armed with arms from the arsenal, in order to attack the seat of government, and I think it must be taken that it is quite clear that from the very first, he was an active party, one of the rebellious party who was acting and in the attack against the Government. . . . At the moment at which Castioni fired the shot, the reasonable presumption is, not that it is a matter of absolute certainty (we cannot be absolutely certain about anything as to men's motives), but the reasonable assumption is that he, at the moment knowing nothing about Rossi, having no spite or ill-will against Rossi, as far as we know, fired that shot—that he fired it thinking it would advance, and that it was an act which was in furtherance of, and done

intending it to be in furtherance of, the very object which the rising had taken place in order to promote, and to get rid of the Government, who, he might, until he had absolutely got into the place, have supposed were resisting the entrance of the people to that place. . . . There is evidence that there was great confusion; there is evidence of shots fired after the shot which Castioni fired; and all I can say is, that looking at it as a question of fact, I have come to the conclusion that at the time at which that shot was fired he acted in the furtherance of the unlawful rising to which at that time he was a party, and an active party—a person who had been doing active work from a very much earlier period, and in which he was still actively engaged. That being so, I think the writ ought to issue, and that we should be acting contrary to the spirit of this enactment, and to the fair meaning of it, if we were to allow him to be detained in custody longer.

HAWKINS, J. I am of the same opinion. . . . Now what is the meaning of crime of a political character? I have thought over this matter very much indeed, and I have thought whether any definition can be given of the political character of the crime—I mean to say, in language which is satisfactory. I have found none at all, and I can imagine for myself none so satisfactory, and to my mind so complete, as that which I find in a work which I have now before me, and the language of which for the purpose of my present judgment I entirely adopt, and that is the expression of my brother Stephen in his History of the Criminal Law of England in vol. ii., pp. 70, 71. I will not do more than refer to the interpretations, other than those with which he agrees, which have been given upon this expression, "political character"; but I adopt his definition absolutely. "The third meaning which may be given to the words, and which I take to be the true meaning, is somewhat more complicated than either of those I have described. An act often falls under several different definitions. For instance, if a civil war were to take place, it would be high treason by levying war against the Queen. Every case in which a man was shot in action would be murder. Whenever a house was burnt for military purposes arson would be committed. To take cattle, &c., by requisition would be robbery. According to the common use of language, however, all such acts would be political offences, because they would be incidents in carrying on a civil war. I think, therefore, that the expression in the Extradition Act ought (unless some

better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances. I do not wish to enter into details beforehand on a subject which might at any moment come under judicial consideration." The question has come under judicial consideration, and having had the opportunity before this case arose of carefully reading and considering the views of my learned brother, having heard all that can be said upon the subject, I adopt his language as the definition that I think is the most perfect to be found or capable of being given as to what is the meaning of the phrase which is made use of in the Extradition Act.

Now, was this act done by Castioni of a political character? . . . I find no evidence which satisfies me that his object in firing at Rossi was to take that poor man's life, or to pay off any old grudge which he had against him, or to revenge himself for anything in the least degree which Rossi or any one of the community had ever personally done to him. When it is said that he took aim at Rossi, there is not a particle of evidence that Rossi was even known to him by name. I cannot help thinking that everybody knows there are many acts of a political character done without reason, done against all reason; but at the same time, one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement. We know that in heat and in heated blood men often do things which are against and contrary to reason; but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over.

For the reasons I have expressed, I am of opinion that . . . the prisoner ought to be discharged.

[STEPHEN, J., delivered a concurring opinion.]

NOTE.—The earliest extradition treaties were generally made for the purpose of securing the return of political offenders to the jurisdiction of the sovereign whom they had offended, Clarke, *The Law of Extradition*, 18, but with the growth of popular government sentiment has so changed that political offenders are now usually not extraditable. The chief difficulty now arises in connection with the determination of what is a political offense, for while the term is found in many treaties there is no agreement as to its meaning. See In re Meunier (1894), 2 Q. B. 415; In re Ezeta (1894), 62 Fed. 972; Ornelas v. Ruiz (1896), 161 U. S. 502; In re

Fedorenko (1910), 20 Manitoba, 221; Oppenheim, I, sec. 183; Bonfils (Fauchille), 287; Piggott, *Extradition*, 42; Moore, *Extradition*, I, 303; Moore, *Digest*, IV, 332; J. Arthur Barrett, "Extradition Treaties," in *25th Report of International Law Association*, (1908), 101; and the papers by J. Reuben Clark, Jr., Frederick R. Coudert, and Judge Julian W. Mack on "The Nature and Definition of Political Offense in International Extradition," in *Proceedings of the American Society of International Law, 1909*, 95-165.

CHAPTER VIII.

THE NON-BELLIGERENT SETTLEMENT OF INTERNATIONAL CONTROVERSIES.

SECTION 1. ARBITRATION.

THE LA NINFA.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT. 1896.
75 Fed. Rep. 513.

Appeal from the District Court of the United States for the District of Alaska.

HAWLEY, District Judge. This is an appeal in admiralty from a decree . . . forfeiting the schooner La Ninfa, upon the ground that she had been unlawfully engaged in killing seal in the waters of Alaska territory. See 49 Fed. 575. The libel charges that the vessel and her crew "were engaged in killing fur seals within the limits of Alaska territory, and in the waters thereof, in violation of section 1956 of the Revised Statutes of the United States." . . . There is no evidence that a single seal had been killed within one marine league of Alaska, whether of the mainland or any of its islands. The evidence does show that the killing of the seals was about 10 miles from shore.

The question arises whether Behring Sea, at a distance of more than one league from the American shore, is Alaskan territory, or in the waters thereof, or within the dominion of the United States in the waters of Behring Sea. Section 1956 of the Revised Statutes reads as follows:

"Sec. 1956. No person shall kill any otter, mink, marten or fur-seal, or other fur-bearing animal, within the limits of Alaska territory, or in the waters thereof; . . . and all vessels, their tackle, apparel, furniture and cargo, found engaged in violation of this section shall be forfeited," etc.

Section 3 of the act to provide for the protection of the salmon

fisheries of Alaska, approved March 2, 1889, provides that section 1956 "is hereby declared to include and apply to all the dominion of the United States in the waters of Behring Sea; and it shall be the duty of the President, at a timely season in each year, to issue his proclamation and cause the same to be published . . . warning all persons against entering said waters for the purpose of violating the provisions of said section," etc. By these provisions, the question as to what the boundaries were over which the United States had dominion was not intended to be, and was not, determined by the amendatory act. The question was left open for future consideration. . . .

The government relies solely upon the provisions of the statute to sustain the decree of the district court, and contends that the decision of the Supreme Court in Re Cooper, 143 U. S. 474, 12 Sup. Ct. 453, justifies the affirmance of the decree. That decision does not reach the direct point here in controversy. The court there held that the question was a political one, in which the United States had asserted a doctrine in opposition to the views contended for by the petitioner; that the negotiations were then pending in relation to the particular subject; but the court declined to decide whether the government was right or wrong in its contention, or to review the action of the political departments upon the question under review. The opinion shows that the court considered it a grave question. It recites much of the important history relative to the disputed question, but the question itself was not decided. The case was disposed of upon other grounds. What was said concerning the disputed questions had reference to the conditions then existing. The conditions now existing are entirely different. The negotiations then pending [between the United States and Great Britain] were brought about by the asserted claim of the United States to proprietary rights in the waters of Behring Sea, and in the fur-bearing animals which frequent it and its islands, which was disputed by other nations, particularly by England, the property of whose subjects had been from time to time seized by the United States for alleged violations of the statutes in question; and these controversies resulted in submitting the disputed question to an arbitration. 27 Stat. 948. Article 1 provides that:

"The questions which have arisen between the government of the United States and the government of her Britannic majesty, concerning the jurisdictional rights of the United States in the waters of Behring Sea, and concerning also the preservation of the fur-seal in, or habitually resorting to the said sea, and the

rights of the citizens and subjects of either country, as regards the taking of fur-seal in, or habitually resorting to the said waters, shall be submitted to a tribunal of arbitration." . . .

By the fourteenth article of the treaty or convention submitting the questions to arbitration it was provided that:

"The high contracting parties engage to consider the result of the proceedings of the tribunal of arbitration as a full, perfect and final settlement of all the questions referred to by the arbitrators."

In submitting the questions to the high court of arbitration, the government agreed to be bound by the decision of the arbitrators, and has since passed an act to give effect to the award rendered by the tribunal of arbitration. 28 Stat. 52. The award should, therefore, be considered as having finally settled the rights of the United States in the waters of Alaska and of Behring Sea, and all questions concerning the rights of its own citizens and subjects therein, as well as of the citizens and subjects of other countries.

The true interpretation of section 1956, and of the amendment thereto, depends upon the dominion of the United States in the waters of Behring Sea,—such dominion therein as was "ceded by Russia to the United States by treaty of 1867." This question has been settled by the award of the arbitrators, and this settlement must be accepted "as final." It follows therefrom that the words "in the waters thereof," as used in section 1956, and the words "dominion of the United States in the waters of Behring Sea," in the amendment thereto, must be construed to mean the waters within three miles from the shores of Alaska. On coming to this conclusion, this court does not decide the question adversely to the political department of the government. It is undoubtedly true, as has been decided by the Supreme Court, that in pending controversies doubtful questions, which are undecided, must be met by the political department of the government. "They are beyond the sphere of judicial cognizance," and, "if a wrong has been done, the power of redress is with Congress, not with the judiciary." The Cherokee Tobacco, 11 Wall. 616-621. But in the present case there is no pending question left undetermined for the political department to decide. It has been settled. The award is to be construed as a treaty which has become final. A treaty, when accepted and agreed to, becomes the supreme law of the land. It binds courts as much as an act of Congress. In Head Money Cases, 112 U. S. 580-598, 5 Sup. Ct. 254, the court said:

"A treaty is primarily a contract between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. . . . A treaty, then, is the law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it, as it would to a statute." Chew Heong v. U. S., 112 U. S. 536, 540, 565, 5 Sup. Ct. 255; U. S. v. Rauscher, 119 U. S. 407-419, 7 Sup. Ct. 234.

The duty of courts is to construe and give effect to the latest expression of the sovereign will; hence it follows that, whatever may have been the contention of the government at the time In re Cooper was decided, it has receded therefrom since the award was rendered by an agreement to accept the same "as a full, complete, and final settlement of all questions referred to by the arbitrators," and from the further fact that the government since the rendition of the award has passed "an act to give effect to the award rendered by the tribunal of arbitration." . . .

The decree of the district court is reversed, and the cause remanded, with instructions to the district court to dismiss the libel.

NOTE.—One of the most important tangible results of The Hague Conference was the creation of a Permanent Court of Arbitration, which was instituted at the Conference of 1899 and strengthened at the Conference of 1907. The Hague Convention for the Pacific Settlement of International Disputes, adopted in 1907, was based upon the underlying principle stated in Article 37:

> International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law.
>
> Recourse to arbitration implies an engagement to submit in good faith to the award.

The organization of the Permanent Court was thus provided for (Art. 44):

> Each contracting Power selects four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrator. . . . .
>
> Two or more Powers may agree on the selection in common of one or more members.
>
> The same person can be selected by different Powers. The members of the Court are appointed for a term of six years. These appointments are renewable.

The first case submitted to the Permanent Court was the Pious Fund Controversy between the United States and Mexico, which was decided in 1902. The decisions thus far rendered by the Permanent Court are not particularly important from a juristic standpoint. Their chief value lies in the fact that they demonstrate the feasibility of settling international controversies by judicial methods. This offers the most hopeful solution of the problem of finding a means of averting war. The decisions of the Permanent Court are accessible in Wilson, *The Hague Arbitration Cases*, and in Scott, *The Hague Court Reports*. The latter is the more complete and contains also the reports of the International Commissions of Inquiry appointed in accordance with the provisions of The Hague Convention for the Pacific Settlement of International Disputes, 1899, Title III.

The literature of international arbitration is extensive. Among the most valuable works are the following: *Proceedings of the American Society for Judicial Settlement of International Disputes* (published annually since 1910); Andrew D. White, *Autobiography*, II, 250 (account of the First Hague Conference by the president of the American delegation); Holls, *The Peace Conference at The Hague* (by an American delegate to the First Conference); Scott, *The Hague Peace Conferences of 1899 and 1907* (by an American delegate to the Second Conference); Cobbett, *Cases and Opinions*, I, 334; Evans Darby, *International Tribunals;* Hershey, *Essentials*, 327; Higgins, *The Hague Peace Conferences;* Lapradelle and Politis, *Recueil des Arbitrages Internationaux;* Morris, *International Arbitration and Procedure;* Phillipson, *Studies in International Law;* Ralston, *International Arbitral Law and Procedure;* Moore, *International Arbitrations;* Moore, *Digest*, VII, 24.

Section 2. Reprisals.

WILLIAM GRAY, ADMINISTRATOR, v. THE UNITED STATES.

Court of Claims of the United States. 1886.
21 Ct. Cl. 340.

[By the treaty of 1800 between the United States and France it was agreed that in return for the relinquishment by France of all exclusive privileges secured to her by the treaties of 1778 the United States would relinquish all claims of American citizens against France growing out of French depredations upon American commerce between 1791 and 1800. In 1885 Congress enacted a law authorizing American citizens having "valid claims to indemnity upon the French Government arising out of illegal captures, detentions, seizures, condemnations, and confiscations" prior to the treaty of 1800, to bring suit in the Court of Claims, and directing that court to "determine the validity and amount"

thereof. Under this act the present suit was brought for indemnity for the loss of the Sally, a schooner owned and commanded by Americans, laden with an American cargo, and which, while on a voyage from Massachusetts to Spain, was seized on the high seas by a French privateer, taken to a French port and condemned for the violation of a French regulation "concerning the navigation of neutrals."]

DAVIS, J., delivered the opinion of the court:

This claim, one of the class popularly called "French Spoliations," springs from the policy of the French revolutionary government between the execution of King Louis XVI and the year 1801, a policy which led to the detention, seizure, condemnation, and confiscation of our merchant vessels peacefully pursuing legitimate voyages upon the high seas. . . . [Here follows an elaborate account of the relations between the United States and France from 1777 to 1800.]

The defendants contend that the seizures were justified, as war existed between this country and France during the period in question; and, as we could have no claim against France for seizure of private property in time of war, the claimants could have no resulting claim against their own Government; that is, the claims, being invalid, could not form a subject of set-off as it is urged these claims did in the second article of the treaty of 1800. It therefore becomes of great importance to determine whether there was a state of war between the two countries.

It is urged that the political and judicial departments of each Government recognized the other as an enemy; that battles were fought and blood shed on the high seas; that property was captured by each from the other and condemned as prize; that diplomatic and consular intercourse was suspended, and that prisoners had been taken by each Government from the other and "held for exchange, punishment, or retaliation, according to the laws and usages of war." While these statements may be in substance admitted and constitute very strong evidence of the existence of war, still they are not conclusive, and the facts, even if they existed to the extent claimed, may not be inconsistent with a state of reprisals straining the relations of the States to their utmost tension, daily threatening hostilities of a more serious nature, but still short of that war which abrogates treaties, and after conclusion of which parties must, as between themselves, begin international life anew.

The French issued decree after decree against our peaceful

commerce, but, on the ground of military necessity incident to the war with Great Britain and her allies; they refused to receive our minister, but in that refusal, insolent though it was, there is nothing to show that war was intended, and the mere refusal to receive a minister does not in itself constitute a ground for hostilities.

The Attorney-General, Mr. Lee, in August, 1798, very strongly sustained the defendant's position, for he wrote the Secretary of State that there existed with France "not only an actual maritime war," but "a maritime war authorized by both nations;" that consequently France was an enemy, to aid and assist whom would be treason on the part of a citizen of the United States; but we cannot agree that this extreme position was authorized by the facts or the law.

Congress enacted the various statutes hereinafter referred to in detail, and when one of them, the act providing an additional armament, was passed in the House, Edward Livingston, who opposed it, said:

"Let no man flatter himself that the vote which has been given is not a declaration of war. Gentlemen know that this is the case."

Those were times of great excitement; between danger of international contest and heat of internal partisan conflict statesmen could not look at the situation with the calmness possessed by their successors, and those successors, with some exceptions to be sure, regarded the relations between the countries as not amounting to war.

The question has been carefully examined by authorized and competent officers of the political department of the Government, and we may turn to their statements as expository of the view of that branch upon the subject. . . . [Here follow extracts from various reports to Congress expressing views similar to those of Senator Livingston and Senator Sumner.]

Mr. Livingston reported to the Senate in 1830 that—

"This was not a case of war, and the stipulations which reconciled the two nations was not a treaty of peace; it was a convention for the putting an end to certain differences. . . . Nowhere is the slightest expression on either side that a state of war existed, which would exonerate either party from the obligations of making those indemnities to the other. . . . The convention which was the result of these negotiations is not only in its form different from a treaty of peace, but it contains stipulations which would be disgraceful to our country on the

supposition that it terminated a state of war. . . . Neither party considered then they were in a state of war." (Rep. 4, 445.) . . .

Mr. Sumner considered the acts of Congress as "vigorous measures," putting the country "in an attitude of defence;" and that the "painful condition of things, though naturally causing great anxiety, did not constitute war." (38th Cong., 1st sess., Rep. 41, 1864.)

The judiciary also had occasion to consider the situation, and the learned counsel for the defendants cites us to the opinion of Mr. Justice Moore, delivered in the case of Bass v. Tingy, (4 Dall. 37), wherein the facts were as follows: Tingy, commander of the public armed ship the Ganges, had libelled the American ship Eliza, Bass, master, setting forth that she had been taken on the high seas by a French privateer the 31st March, 1799, and retaken by him late in the following April, wherefore salvage was claimed and allowed below. Upon appeal the judgment was affirmed. Each of the four justices present delivered an opinion.

Justice Moore, answering the contention that the word "enemy" could not be applied to the French, says:

"How can the character of the parties engaged in hostility of war be otherwise described than by the denomination of enemies? It is for the honor and dignity of both nations, therefore, they should be called enemies; for it is by that description alone that either could justify or excuse the scene of bloodshed, depredation, and confiscation which has unhappily occurred, and surely Congress could only employ the language of the act of June 13, 1798, towards a nation whom she considered as an enemy."

Justice Washington considers the very point now in dispute, saying (p. 40):

"The decision of the question must depend upon . . . whether at the time of passing the act of Congress of the 2d of March, 1799, there subsisted a state of war between two nations. It may, I believe, be safely laid down that every contention by force between two nations, in external matters, under the authority of their respective Governments, is not only war, but public war. If it be decreed in form it is called solemn and is of the perfect kind, because one whole nation is at war with another whole nation, and all the members of the nation declaring war are authorized to commit hostilities against the members of the other in every place and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition.

But hostilities may subsist between two nations more confined in its nature and extent, being limited as to places, persons, and things, and this is more properly termed imperfect war, because not solemn, and because those who are authorized to commit hostilities act under special authority and can go no further than to the extent of their commission. Still, however, it is public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities such as in a solemn war, where the Government retains the general power."

Applying this rule he held that "an American and French armed vessel, combating on the high seas, were enemies," but added that France was not styled "an enemy" in the statutes, because "the degree of hostility meant to be carried on was sufficiently described without declaring war, or declaring that we were at war. Such a declaration by Congress might have constituted a perfect state of war which was not intended by the Government."

Justice Chase, who had tried the case below, said:

"It is a limited, partial war. Congress has not declared war in general terms, but Congress has authorized hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land, to capture unarmed French vessels, nor even to capture armed French vessels in a French port, and the authority is not given indiscriminately to every citizen of America against every citizen of France, but only to citizens appointed by commissions or exposed to immediate outrage and violence. . . . If Congress had chosen to declare a general war, France would have been a general enemy; having chosen to wage a partial war, France was . . . only a partial enemy."

Justice Patterson concurred, holding that the United States and France were "in a qualified state of hostility"—war "*quoad hoc.*" As far as Congress tolerated and authorized it, so far might we proceed in hostile operations and the word "enemy" proceeds the full length of this qualified war, and no further.

The Supreme Court, therefore, held the state of affairs now under discussion to constitute partial warfare, limited by the acts of Congress.

The instructions to Ellsworth, Davie, and Murray, dated October 22, 1799, did not recognize a state of war as existing, or as having existed, for they said the conduct of France would

have justified an immediate declaration of war, but the United States, desirous of maintaining peace, contented themselves "with preparations for defence and measures calculated to defend their commerce." (Doc. 102, p. 561.) Yet all the measures relied upon as evidence of existing war had taken effect prior to the date of these instructions. So the ministers, in a communication to the French authorities, said, as to the acts of Congress, "which the hard alternative of abandoning their commerce to ruin imposed," that "far from contemplating a cooperation with the enemies of the Republic [they] did not even authorize reprisals upon her merchantmen, but were restricted simply to the giving of safety to their own, till a moment should arrive when their sufferings could be heard and redressed." (Doc. 102, p. 583.)

France did not consider that war existed, for the minister said that the suspension of his functions was not to be regarded as a rupture between the countries, "but as a mark of just discontent" (15 Nov., 1796, Foreign Relations, vol. I. p. 583), while J. Bonaparte and his colleagues termed it a "transient misunderstanding" (Doc. 102, p. 590), a state of "misunderstanding" which had existed "through the acts of some agents rather than by the will of the respective 'Governments,'" and which had not been a state of war, at least on the side of France. (Ib. 616.)

The opinion of Congress at the time is best gleaned from the laws which it passed. The important statute in this connection is that of May 28, 1798 (1 Stat. L., 561), entitled "An act more effectually to protect the commerce and coasts of the United States." Certainly there was nothing aggressive or warlike in this title.

The act recites that, whereas French armed vessels have committed depredations on American commerce in violation of the law of nations and treaties between the United States and France, the President is authorized—not to declare war, but to direct naval commanders to bring into our ports, to be proceeded against according to the law of nations, any such vessels "which shall have committed, or which shall be found hovering on the coasts of the United States for the purpose of committing, depredations on the vessels belonging to the citizens thereof; and also to retake any ship or vessel of any citizen or citizens of the United States which may have been captured by any such armed vessel."

This law contains no declaration or threat of war; it is distinctly an act to protect our coasts and commerce. It says that

our vessels may arrest a vessel raiding or intending to raid upon that commerce, and that such vessel shall not be either held by an executive authority or confiscated, but turned over to the admiralty courts—recognized international tribunals—for trial, not according to municipal statutes, as was being done in France, but according to the law of nations. Such a statute hardly seems necessary, for if it extended at all the police powers of naval commanders upon the high seas it was in the very slightest degree, and it is highly improbable that then or now, with or without specific statutory or other authority, an American naval commander would in fact allow a vessel rightfully flying the flag of the United States to be seized on the high seas or near our coasts by the cruisers of another Government. But if the act did enlarge the power of such officers, and give to them authority not theretofore possessed, it tied them down to specific action in regard to specified vessels.

They might seize armed vessels only, and only those armed vessels which had already committed depredations, or those which were on our coast for the purpose of committing depredations, and they might retake an American vessel captured by such an armed vessel. This statute is a fair illustration of the class of laws enacted at this time; they directed suspension of commercial relations until the end of the next session of Congress, not indefinitely (June 13, 1798, ib. § 4, p. 566); they gave power to the President to apprehend the subjects of hostile nations whenever he should make "public proclamation" of war (July 6, 1798, ib. 577), and no such proclamation was made; they gave him authority to instruct our armed vessels to seize French "armed," not merchant, vessels (July 9, 1798, ib., 578), together with contingent authority to augment the army in case war should break out or in case of imminent danger of invasion. (March 2, 1799, ib., 725.) Within a few months after this last act of Congress the Ellsworth mission was on its way to France to begin the negotiations which resulted in the treaty of 1800 and even the act abrogating the treaties of 1778 does not speak of war as existing, but of "the system of predatory violence . . . hostile to the rights of a free and independent nation." (July 7, 1798, ib., 578.)

If war existed, why authorize our armed vessels to seize French armed vessels? War itself gave that right, as well as the right to seize merchantmen, which the statutes did not permit. If war existed why empower the President to apprehend foreign enemies? War itself placed that duty upon him as a

necessary and inherent incident of military command. Why, if there was war, should a suspension of commercial intercourse be authorized, for what more complete suspension of that intercourse could there be than the very fact of war? And why, if war did exist, should the President, so late as March, 1799, be empowered to increase the army upon one of two conditions, viz., that war should break out or invasion be imminent, that is, if war should break out in the future or invasion become imminent in the future?

Upon these acts of Congress alone it seems difficult to found a state of war up to March, 1799, while in February, 1800, we find a statute suspending enlistments, unless, during the recess of Congress, "war should break out with France." This is proof positive that Congress did not then consider war as existing, and in fact Ellsworth, Davie, and Murray were at the time hard at work in Paris. In May following the President was instructed to suspend action under the act providing for military organization, although the treaty was not concluded until the following September.

This legislation shows that war was imminent; that protection of our commerce was ordered, but distinctly shows that, in the opinion of the legislature, war did not in fact exist.

Wheaton draws a distinction between two classes of war, saying:

"A perfect war is where one whole nation is at war with another nation, and all the members of both nations are authorized to commit hostilities against all the members of the other, in every case, and under every circumstance permitted by the general laws of war. An imperfect war is limited as to places, persons, and things [to which the editor adds]: Such were the limited hostilities authorized by the United States against France in 1798." (Lawrence's Wheaton, 518.)

There was no declaration of war; the tribunals of each country were open to the other—an impossibility were war in progress; diplomatic and commercial intercourse were admittedly suspended; but during many years there was no intercourse between England and Mexico, which were not at war; there was retaliation and reprisal, but such retaliations and reprisals have often occurred between nations at peace; there was a near approach to war, but at no time was one of the nations turned into an enemy of the other in such manner that every citizen of one became the enemy of every citizen of the other; finally, there was not that kind of war which abrogated treaties and wiped

out, at least temporarily, all pending rights and contracts, individual and national.

In cases like this "the judicial is bound to follow the action of the political department of the Government, and is concluded by it" (Phillips v. Payne, 92 U. S. R. 130); and we do not find an act of Congress or of the Executive between the years 1793 and 1801 which recognizes an existing state of solemn war, although we find statutory provisions authorizing a certain course "in the event of a declaration of war," or "whenever there shall be declared war," or during the existing "differences." One act provides for the increase of the army "in case war shall break out," while another restrains this increase "unless war shall break out." (1 Stat. L., 558, 577, 725, 750; see also acts of Feb. 10, 1800, and May 14, 1800.)

We have already referred to the instructions of the Executive, which show that branch of the Government in thorough accord with the legislative on this subject, and the negotiations of our representatives hereinafter referred to were marked by the same views, while the treaty itself—a treaty of amity and commerce of limited duration—is strong proof that what were called "differences" did not amount to war. We are, therefore, of the opinion that no such war existed as operated to abrogate treaties, to suspend private rights, or to authorize indiscriminate seizures and condemnations; that, in short, there was no public general war, but limited war in its nature similar to a prolonged series of reprisals. . . .

NOTE.—In The Schooner Endeavor (1909), 44 Ct. Cl. 242, 268, the Court of Claims said:

> To justify reprisals some specific wrong must be committed and the seizure must be made by way of compensation in value for such wrong. In other words, as a means of satisfaction without resort to actual war letters of marque are, or were formerly, issued by the state to certain of her citizens authorizing them to seize and take the person and property of the citizens of the offending state wherever found. But such reprisals when thus made will not become complete, justifying confiscation, until after hope of satisfaction has ceased or actual war has begun. . . . .
>
> While reprisals are acts of war in fact, it is for the state affected to determine for itself whether the relation of actual war was intended by them; and if it so elects to regard such acts then the property so seized becomes liable to confiscation at once; otherwise it is to be held until hope of satisfaction has ceased.

See also Cushing, Administrator v. United States (1887), 22 Ct. Cl. 1, 37; Hooper, Administrator v. United States (1887), 22 Ct. Cl. 408, 428, 456; Bonfils (Fauchille), 651; Moore, *Digest*, VII, 119.

SECTION 3. EMBARGO.

THE BOEDES LUST.

HIGH COURT OF ADMIRALTY OF GREAT BRITAIN. 1804.
5 C. Robinson, 233.

[On May 16, 1803, the government of Great Britain imposed an embargo on all Dutch property in British ports. In consequence, the Boedes Lust, a vessel belonging to residents of the Dutch colony of Demerara, was seized. The next month war was declared between England and Holland. In December, 1803, the colony of Demerara was ceded to England. The original owners now seek to recover the vessel.]

SIR WILLIAM SCOTT [LORD STOWELL]. . . . The claim is given for several persons as inhabitants of Demerara, not settling there during the time of British possession, nor averring an intention of returning when that possession ceased. They are therefore to be treated under this general view as Dutch subjects, unless it can be shown that there are any other circumstances by which they are protected. It is contended that there are such circumstances and that they are these: That the property was taken in a state of peace, and that the proprietors are now become British subjects, and consequently that this property could not be considered as the property of an enemy, either at the time of capture or adjudication. Now, with respect to the first of these pleas, it must be admitted, that alone would not protect them, because the Court has, without any exception, condemned all other property of Dutchmen taken before the war—And upon what ground?—That the declaration had a retroactive effect, applying to all property previously detained, and rendering it liable to be considered as the property of enemies taken in time of war. This property was seized provisionally, an act hostile enough in the mere execution, but equivocal as to the effect, and liable to be varied by subsequent events, and by the conduct of the Government of Holland. If that conduct had been such as to reestablish the relations of peace, then the seizure, although made with the character of a hostile seizure, would have proved in the event a mere embargo, or temporary sequestration. The property would have been restored, as it is usual, at the conclusion of embargoes; a process often resorted to in the practice of nations, for various causes not immediately connected with any expectations of hostility.

During the period that this embargo lasted, it is said, that the Court might have restored, but I cannot assent to that observation; because, on due notice of embargoes, this Court is bound to enforce them. It would be a high misprision in this Court, to break them, by re-delivery of possession to the foreign owner of that property, which the Crown had directed to be seized and detained for farther orders. The Court acting in pursuance of the general orders of the State, and bound by those general orders, would be guilty of no denial of justice, in refusing to decree restitution in such a case, for it has not the power to restore. Its functions are suspended by a binding authority, and if any injustice is done that is an account to be settled between the States. The Court has no responsibility, for it has no ability to act.

This was the state of the first seizure. It was at first equivocal; and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo, so terminated. That would have been the retroactive effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impresses the direct hostile character upon the original seizure. It is declared to be no embargo, it is no longer an equivocal act, subject to two interpretations; there is a declaration of the *animus,* by which it was done, that it was done *hostili animo,* and is to be considered as an hostile measure *ab initio.* The property taken is liable to be used as the property of persons, trespassers *ab initio,* and guilty of injuries, which they have refused to redeem by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restitution of such property taken before a formal declaration of hostilities. No such convention is set up on either side, and the State, by directing proceedings against this property for condemnation, has signified a contrary intention. Accordingly the general mass of Dutch property has been condemned on this retroactive effect; and this property stands upon the same footing as to the seizure, for it was seized at the same time, and with the same intent. . . .

The Settlement [Demerara] has since surrendered to the British arms, and the parties are become British subjects; and this, it is said, takes off the hostile effect, although it might have attached. This argument, to be effective, must be put in one of these two ways, either that the condemnation pronounced upon Dutch property went upon the ground that, though seized in

time of neutrality, it could not be restored only, because the parties were not now in a condition to receive it; or else, that though seized at a time, that may to some effects be considered as time of war, yet the subjects, having become friends, are entitled to restitution. This latter position cannot be maintained for a moment. It is contradicted by all experience and practice, even in the case of those who had an original British character. . . . Where property is taken in a state of hostility, the universal practice has ever been to hold it subject to condemnation, although the claimants may have become friends and subjects prior to the adjudication. The plea of having again become British subjects, therefore, will not relieve them, and the other ground must be resorted to. That is equally untenable in point of fact; for the condemnation of the other Dutch property proceeded on no such ground as the mere incapacity of the proprietors to receive restitution. It proceeded on the other ground, which I have before mentioned, the retroactive effect of the declaration, which rendered their property liable to be treated as the property of enemies at the time of seizure. . . .

NOTE.—The laying of an embargo is an act of state, The Theresa Bonita (1802), 4 C. Robinson, 236. The term is applied to two measures which from a juristic standpoint are of an entirely different character. The first is an embargo laid by a country upon its own ships either for purpose of protection or for the enforcement of some measure of the country's policy. This is purely a municipal regulation and while it may affect other countries it is not a measure to which they have a right to object. See Phillimore, III, 44. The American Embargo Acts of 1807 and 1809 were measures of this kind. For a full citation of cases arising under them see Moore, *Digest*, VII, 142. An embargo may also be laid with hostile intent upon the property of citizens of other countries, either for the purpose of compelling other countries to adopt a desired line of action, in which case it is in essence only a form of reprisal or retaliation, or because war is anticipated or has actually begun. See The Gertruyda (1799), 2 C. Robinson, 211, 219.

CHAPTER IX.

THE BELLIGERENT RELATIONS OF STATES.

Section 1. The Beginning of War.

THE PRIZE CASES.

THE BRIG AMY WARWICK. THE SCHOONER CRENSHAW. THE BARQUE HIAWATHA. THE SCHOONER BRILLIANTE.

Supreme Court of the United States. 1863.
2 Black, 635.

[The four vessels included in these cases had been captured by public vessels of the United States for attempting to violate the blockade of the so-called Confederate States which had been established by President Lincoln's proclamations of April 19 and April 27, 1861. They were libelled on behalf of the United States and in each case the District Court pronounced a decree of condemnation from which the several owners appealed. Besides the questions peculiar to each case, the court was obliged to consider certain fundamental questions as to the validity of the blockade.]

Mr. Justice Grier. There are certain propositions of law which must necessarily affect the ultimate decision of these cases, and many others, which it will be proper to discuss and decide before we notice the special facts peculiar to each.

They are, 1st. Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the government, on the principles of international law, as known and acknowledged among civilized States?

2d. Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as "enemies' property"?

I. Neutrals have a right to challenge the existence of a block-

ade de facto, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly nation for the purpose of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy.

That a blockade de facto actually existed, and was formally declared and notified by the President on the 27th and 30th of April, 1861, is an admitted fact in these cases.

That the President, as the Executive Chief of the Government and Commander-in-Chief of the Army and Navy, was the proper person to make such notification, has not been, and cannot be disputed.

The right of prize and capture has its origin in the *jus belli*, and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist de facto, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.

Let us inquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force.

War has been well defined to be, "That state in which a nation prosecutes its right by force."

The parties belligerent in a public war are independent nations. But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other.

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents,—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. They claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels

who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

"A civil war," says Vattel, "breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms.

"This being the case, it is very evident that the common laws of war—those maxims of humanity, moderation, and honor—ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, &c., &c.; the war will become cruel, horrible, and every day more destructive to the nation."

As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and know.

The true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, civil war exists and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land."

By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign

nation or a domestic State. But by the Acts of Congress of February 28, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "unilateral." Lord Stowell (1 Dodson, 247) observes, "It is not the less a war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other."

The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the Act of Congress of May 13, 1846, which recognized "a state of war as existing by the act of the Republic of Mexico." This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress.

This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. In the case of the Santissima Trinidad (7 Wheaton, 337), this court say: "The Government of the United States

has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war." (See also 3 Binn., 252.)

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality, "recognizing hostilities as existing between the Government of the United States of America and certain States styling themselves the Confederate States of America." This was immediately followed by similar declarations or silent acquiescence by other nations.

After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a Court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the Government and paralyze its power by subtle definitions and ingenious sophisms.

The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this Court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not enemies because they are traitors; and a war levied on the government by traitors, in order to dismember and destroy it, is not a war because it is an "insurrection."

Whether the President, in fulfilling his duties as Commander-in-chief in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions, as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was intrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and author-

ized a recourse to such a measure, under the circumstances peculiar to the case.

The correspondence of Lord Lyons with the Secretary of State admits the fact and concludes the question.

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress "*ex majore cautela*" and in anticipation of such astute objections, passing an act "approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., as if they had been issued and done under the previous express authority and direction of the Congress of the United States."

Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law, "*omnis ratihabitio retrotrahitur et mandato equiparatur,*" this ratification has operated to perfectly cure the defect. In the case of Brown vs. United States (8 Cr., 131, 132, 133), Mr. Justice Story treats of this subject, and cites numerous authorities to which we may refer to prove this position, and concludes, "I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy, when the sovereign has prohibited it. But suppose he did, I would ask if the sovereign may not ratify his proceedings, and thus by a retroactive operation give validity to them?"

Although Mr. Justice Story dissented from the majority of the Court on the whole case, the doctrine stated by him on this point is correct and fully substantiated by authority.

The objection made to this act of ratification, that it is ex post facto, and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal Court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.

On this first question therefore we are of the opinion that the President had a right, *jure belli,* to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard. . . .

UNITED STATES OF AMERICA v. PELLY AND ANOTHER.

QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE OF GREAT BRITAIN.
1899.
4 Commercial Cases, 100.

[On April 21, 1898, the plaintiff, through Lieutenant Sims, Acting Naval Attaché of the American Embassy in London, contracted for the purchase of two steamers belonging to a company of which the defendants were managers. The contract provided that the vendors should deliver the steamers in New York "as soon as possible," and that a deposit of ten per cent of the purchase price should be paid on the signing of the contract. It was also agreed (clause 7) that "if from blockade or any other cause arising from the United States of America becoming belligerents and preventing delivery of either of the said steamers this contract is to be null and void, but the vendor is to retain the deposit as and for liquidated damages." On April 21, the American fleet sailed from Key West and on April 22 a Spanish ship, the Buena Ventura, was captured. News of this capture was published in the London evening papers of April 22 and in The Times of April 23. On April 26, Congress adopted a resolution declaring that war existed and had existed since April 21 between the United States and Spain. On the same day, April 26, the British proclamation of neutrality dated April 23 was issued. On April 23 the defendants notified the American Embassy that in consequence of the outbreak of war they were prevented from delivering the steamers. Lieutenant Sims replied the same day, "The fact of a state of war existing between the United States and Spain has no bearing on the case so far as you are concerned. No man in England has, or will have, any official knowledge of the state of affairs until his Government notifies him of the fact by a proclamation of neutrality." The steamers not having been delivered, this action was brought to recover the deposit of £5,300. The defendants relied upon the British Foreign Enlistment Act, 1870 (33 and 34 Vict. c. 90) which provides: "S. 8. If any person within Her Majesty's dominions, without the license of Her Majesty, does any of the following acts; that is to say . . . (4) Despatches or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state

at war with any friendly state: Such person shall be deemed to have committed an offence against this Act."]

BIGHAM, J. . . . The defendants were bound to do their best to get the ships despatched "as soon as possible," and one reason for that was, as the United States knew, that it was desirable to get the ships away before the Foreign Enlistment Act operated to interfere with their departure. It has been suggested that the defendants from the very first intended to defeat the object of the contract and so make sure of retaining the deposit and in that way realize a profit without giving any consideration for it. I do not think that there is the least ground for making that suggestion. The evidence satisfies me that the defendants did their best on April 22 to carry out the contract all through the day and I am satisfied that by the morning of April 23—that is to say, before the defendants had had time to get the ships afloat on their voyage to New York—they had ascertained, as the fact was, that a state of war existed. I will state why it is a fact that a state of war then existed. An act of hostility had been committed on April 22 by American men-of-war against Spanish traders, or, at all events, against one Spanish trader, which act, in my opinion, was only consistent with the existence of a state of war. Further, on April 22 the American President issued a proclamation in which he declared a general blockade of Cuba. A few days later the Congress passed a resolution authorizing a formal state of war, but, in so doing, recorded, what was undoubtedly the fact, that a state of war had existed from some days previously. It is therefore true to say that a state of war existed on April 23, and I am inclined to think that it existed also on April 22 and 21, but it is not necessary to decide that. On April 23 the defendants realized the actual state of things and communicated with Lieutenant Sims. He being, very probably, anxious to do all he could to get the contract performed, gave his view, insisting, wrongly, as I think, that there could be no state of war affecting the defendants unless and until war was formally recognized by our Government. . . . In these circumstances the question is whether the defendants were prevented, within the meaning of clause 7 of the contract, from delivering the ships. [His Lordship read S. 8 of the Foreign Enlistment Act, 1870.] In my opinion if the defendants had proceeded with the despatch of the vessels on or after April 23 they would have violated that section and have brought themselves within the Act. It is sufficient to say that, if a man finds himself doing some act which is contrary to law,

he is "prevented" from doing that act. Clause 7 of the contract does not merely mean physical prevention, but that, if it is improper or wrong for the defendants to deliver the ships, the defendants are not to do so, but are in that event to be compensated for their trouble and expenses by retaining the deposit. For these reasons there will be judgment for the defendants, with costs. . . .

NOTE.—It was formerly the custom to institute wars by a formal declaration. In the eighteenth century that custom fell into disuse. See Maurice, *Hostilities without Declaration of War*, for the practice from 1700 to 1870. The Franco-Prussian War was begun by a formal declaration and that has been the general custom since, and is enjoined by The Hague Conventions. But since war is a status, its existence does not depend upon a formal declaration, but only upon the fact. It may begin therefore with the first act of hostility, The Teutonia (1872), 8 Moore, P. C., (N. S.) 411. The Russo-Japanese War was begun without a formal declaration. In the case of The Argun (1904), Takahashi, 573, the claimant argued that the vessel should be restored because captured before the declaration of war. To this the Prize Court of Sasebo replied:

> When diplomatic negotiations concerning the Manchurian and Korean questions were going on between Japan and Russia, the latter country unreasonably failed to give her answer to Japan. On the other hand, she showed great activity in her army and navy, sent her land forces to Manchuria and Korea, collected her war vessels at Port Arthur, and thus showed her determination to fight. This fact was clear. Whereupon Japan, on the 5th day of the 2nd month of the 37th year of Meiji, notified Russia that all diplomatic relations were at an end. At the same time Japan made preparations for action and the next day, the 6th at 7 A. M., her fleet left Sasebo with the object of attacking the Russian fleet. Inferring from the conduct of the navies of both countries and from the state of things at the time, that hostile operations were publicly opened prior to the capture of the steamship now under consideration; and as it is thus clear that a state of war had begun before the time of the ship's capture, there is no need to discuss whether it was made before the declaration of war or not.

For an account of the controversy growing out of Japan's attack on Russia before the declaration of war, see Pitt Cobbett, *Cases and Opinions*, II, 1; *Int. Law Sit. 1910*, 58; Asakawa, *The Russo-Japanese Conflict;* Hershey, *The International Law and Diplomacy of the Russo-Japanese War;* Lawrence, *War and Neutrality in the Far East;* Ariga, *La Guerre Russo-Japonaise;* Rey, *La Guerre Russo-Japonaise.* The Russian side of the controversy is stated by the eminent Russian jurist, F. de Martens, in *Revue Générale de Droit International Public*, XI, 148. His view is that a formal declaration of war is not necessary provided the relations between the two countries are such that war is not an improbable eventuality. On the war between the United States and Spain, see The Pedro (1899), 175 U. S. 354.

In the Great War of 1914, there was a formal declaration in each instance. See Phillipson, *International Law and the Great War*, ch. iii.

Prior to the actual outbreak of war, its imminence will justify precautions, The Teutonia (1870), L. R. 4 P. C. 471. War may exist by the declaration of one belligerent only, The Nayade (1802), 4 C. Robinson, 251; The Success (1812), 1 Dodson, 133; The Pedro (1899), 175 U. S. 354. On this point Lord Stowell in The Eliza Ann (1813), 1 Dodson, 244, said:

> A declaration of war by one country was not a mere challenge to be accepted or refused by the other. On the contrary, it served to show the existence of actual hostilities on one side at least; and hence put the other party also into a state of war, even though he might think proper to act on the defensive only.

On the whole subject see Barclay, *Law and Usage of War;* Bordwell, *The Law of War;* Cobbett, *Cases and Opinions*, II, 11; Moore, *Digest*, VII, 168; *Int. Law Sit. 1910*, 45; *Int. Law Topics, 1913*, 54.

Section 2. Enemy Character.

THE HARMONY.

High Court of Admiralty of Great Britain. 1800.
2 C. Robinson, 322.

This was one of several American vessels in which a claim had been reserved for part of the cargo, on further proof to be made of the national character of G. W. Murray, who appeared in the original case, as a partner of a house of trade in America, but personally resident in France; restitution had been decreed in the several claims to the house of trade in America, with a reservation of the share of this partner. . . . [It appeared in evidence that G. W. Murray, an American citizen, had gone to France in 1794 to dispose of a cargo belonging to his firm. He remained a year and after a visit of about six months to America, he returned to France and four years later was still in that country. The court construed this as a continuous residence of six years in France. The claimant argued that these facts did not show a domicile in France.]

Sir W. Scott [Lord Stowell]—This is a question which arises on several parcels of property claimed on behalf of G. W. Murray; and it is in all of them a question of residence or domicil, which I have often had occasion to observe, is in itself a question of considerable difficulty, depending on a great variety of circumstances, hardly capable of being defined by any general

precise rules: The active spirit of commerce now abroad in the world, still farther increases this difficulty by increasing the variety of local situations, in which the same individual is to be found at no great distance of time; and by that sort of extended circulation, if I may so call it, by which the same transaction communicates with different countries, as in the present cases, in which the same trading adventures have their origin (perhaps) in America, travel to France, from France to England, from England back to America again, without enabling us to assign accurately the exact legal effect of the local character of every particular portion of this divided transaction.

In deciding such cases, the necessary freedom of commerce imposes likewise the duty of a particular attention and delicacy; and strict principle of law must not be pressed too eagerly against it; and I have before had occasion to remark, that the particular situation of America, in respect to distance, seems still more particularly to entitle the merchants of that country to some favourable distinctions. They live at a great distance from Europe; they have not the same open and ready constant correspondence with individuals of the several nations of Europe, that these persons have with each other; they are on that very account more likely to have their mercantile confidence in Europe abused, and therefore to have more frequent calls for a personal attendance to their own concerns; and it is to be expected that when the necessity of their affairs calls them across the Atlantic, they should make rather a longer stay in the country where they are called, than foreign merchants who step from a neighboring country in Europe, to which every day offers a convenient opportunity of return. . . .

Of the few principles that can be laid down generally, I may venture to hold, that time is the grand ingredient in constituting domicil. I think that hardly enough is attributed to its effects; in most cases it is unavoidably conclusive; it is not unfrequently said, that if a person comes only for a special purpose, *that* shall not fix a domicil. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy; for if the purpose be of a nature that *may, probably,* or *does actually* detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose. A special purpose may lead a man to a country, where it shall detain him the whole of his life. A man comes here to follow a lawsuit; it may happen, and indeed is often used as a ground

of vulgar and unfounded reproach, (unfounded as a matter of just reproach though the fact may be true), on the laws of this country, that it may last as long as himself. Some suits are famous in our juridicial history for having even outlived generations of suitors. I cannot but think that against such a long residence, the plea of an original special purpose could not be averred; it must be inferred in such a case, that other purposes forced themselves upon him and mixed themselves with his original design and impressed upon him the character of the country where he resided. Suppose a man comes into a belligerent country at or before the beginning of a war; it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself; but if he continues to reside during a good part of the war, contributing, by payment of taxes, and other means, to the strength of that country, I am of opinion, that he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the fraud and abuses of masked, pretended, original, and sole purposes of a long continued residence. There is a time which will estop such a plea; no rule can fix the time *a priori*, but such a time there *must* be.

In proof of the efficacy of mere time, it is not impertinent to remark, that the same quantity of business, which would not fix a domicil in a certain space of time, would nevertheless have that effect, if distributed over a large space of time. Suppose an American comes to Europe, with six contemporary cargoes, of which he had the present care and management, meaning to return to America immediately; they would form a different case from that, of the same American, coming to any particular country of Europe, with one cargo, and fixing himself there, to receive five remaining cargoes, one in each year successively. I repeat, that time is the great agent in this matter; it is to be taken in a compound ratio, of the time and the occupation, with a great preponderance on the article of time: be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute a domicil. . . . [The learned judge here makes an elaborate examination of the evidence as to Murray's residence in France, and finds that the facts show a domicile established in that country.]

I feel myself under the necessity . . . of condemning his share of the property in these several cargoes.

THE INDIAN CHIEF.

HIGH COURT OF ADMIRALTY OF GREAT BRITAIN. 1801.
3 C. Robinson, 12.

[The claimant Johnson was an American citizen long resident in London. While the vessel in question was on a voyage from Batavia, a Dutch colony, to Hamburgh, her owner Johnson determined to return to America, and did actually leave England September 9, 1797. The vessel was captured November 1, 1797. The material point to be determined was whether or not Johnson had lost his British domicile.]

SIR W. SCOTT [LORD STOWELL] :—This is the case of a ship seized in the port of Cowes, where she came to receive orders respecting the delivery of a cargo taken in at Batavia, with a professed original intention of proceeding to Hamburgh, but on coming into this country for particular orders, the ship and cargo were seized in port. It does not appear clear to the Court, that it might not be a cargo intended to be delivered in this country, as many such cargoes have been, under the Dutch property act: I mention this to meet an observation that has been thrown out, "that it is doubtful whether the ship might not be confiscable on the ground of being a neutral ship coming from a colony of the enemy, not to her own ports or the ports of this country." I cannot assume it as a demonstrated fact in the case, that the cargo was to be delivered at Hamburgh. The vessel sailed in 1795, and as an American ship with an American pass, and all American documents; but nevertheless if the owner really resided here, such papers could not protect his vessel: if the owner was resident in England, and the voyage such as an English merchant could not engage in, an American residing here, and carrying on trade, could not protect his ship merely by putting American documents on board; his interest must stand or fall according to the determination which the Court shall make on the national character of such a person.

There are two positions which are not to be controverted; that Mr. Johnson is an American generally by birth, which is the circumstance that first impresses itself on the mind of the Court; and also by the part which he took on the breaking out of the American war. He came hither when both countries were open to him; but on the breaking out of hostilities, he made his election which country he would adhere to, and in consequence thereof went to France . . . He came however to this country

in 1783, and engaged in trade, and has resided in this country till 1797; during that time he was undoubtedly to be considered as an English trader; for no position is more established than this, that if a person goes into another country, and engages in trade, and resides there, he is, by the law of nations, to be considered as a merchant of that country; I should therefore have no doubt in pronouncing that Mr. Johnson was to be considered as a merchant of this country, at the time of sailing of this vessel on her outward voyage . . .

Now there can be no doubt that if Mr. Johnson had continued where he was at the time of sailing, if he had remained resident in England, it must be considered as a British transaction; and therefore a criminal transaction, on the common principle that it is illegal in any person owing an allegiance, though temporary, to trade with the public enemy. But it is pleaded that he had quitted this country before the capture, and that he had done this in consequence of an intention he had formed of removing much earlier, but that he had been prevented by obstacles that obstructed his wish: to this effect the letter of March, 1797 is exhibited, which must have been preceded by private correspondence and application to some of his creditors. It does, I think, breathe strong expressions of intention, and of an ardent desire to get over the restraint that alone detained him; and it affords conclusive reason to believe that if he had been a free man, and at liberty to go where he pleased, he would have removed long before; and that he was detained here as a hostage, as he describes himself, to his creditors, on motives of honor creditable to his character. On the 9th of September 1797 he did actually retire; of the sincerity of his quitting this country there can hardly be a doubt entertained; it is almost impossible to represent stronger or more natural grounds for such a measure; and I do not think the Court runs any risk of encountering a fraudulent pretension, put forward to meet the circumstances of the moment, without anything of an original and *bona fide* intention at the bottom of it . . .

The ship arrives a few weeks after his departure, and taking it to be clear, that the national character of Mr. Johnson as a British merchant was founded in residence only, that it was acquired by residence, and rested on that circumstance alone; it must be held that from the moment he turns his back on the country where he has resided, on his way to his own country, he was in the act of resuming his original character, and is to be considered as an American: The character that is gained by

residence ceases by residence: It is an adventitious character which no longer adheres to him, from the moment that he puts himself in motion, *bona fide*, to quit the country, *sine animo revertendi*. The Courts that have to apply this principle, have applied it both ways, unfavourably in some cases, and favourably in others. This man had actually quitted the country. Stronger was the case of Mr. Curtissos; he was a British-born subject, that had been resident in Surinam and St. Eustatius, and had left those settlements with an intention of returning to this country; but he had got no farther than Holland, the mother country of those settlements, when the war broke out. It was determined by the Lords of Appeal, that he was *in itinere*, that he had put himself in motion, and was in pursuit of his native British character: and as such, he was held to be entitled to the restitution of his property. So here, this gentleman was in actual pursuit of his American character; and, I think, there can be no doubt that his native character was strongly and substantially revived, not occasionally, nor colourably, for the mere purpose of the present claim; and therefore I shall restore the ship.

THIRTY HOGSHEADS OF SUGAR, BENTZON, CLAIMANT, v. BOYLE AND OTHERS.

SUPREME COURT OF THE UNITED STATES. 1815.
9 Cranch, 191.

Appeal from the sentence of the Circuit Court for the district of Maryland, condemning 30 hogsheads of sugar, the property of the Claimant, a Danish subject, it being the produce of his plantation in Santa Cruz, and shipped after the capture of that island by the British, to a house in London for account and risk of the Claimant, who was a Danish officer and the second in authority in the government of the island before its capture; and who, shortly after the capture, withdrew, and has since resided in the United States and in Denmark. By the articles of capitulation, the inhabitants were permitted to retain their property, but could only ship the produce of the island to Great Britain. This sugar was captured in July, 1812, after the declaration of war by the United States against Great Britain, and libelled as British property. . . .

MARSHALL, Ch. J., delivered the opinion of the Court. . . .

Some doubt has been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be con-

sidered as a British island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark.

Must the produce of a plantation in that island, shipped by the proprietor himself, who is a Dane residing in Denmark, be considered as British, and therefore enemy property?

In arguing this question, the counsel for the Claimant has made two points.

1. That this case does not come within the rule applicable to shipments from an enemy country, even as laid down in the British Courts of admiralty.

2. That the rule has not been rightly laid down in those Courts, and consequently will not be adopted in this.

1. Does the rule laid down in the British Courts of admiralty embrace this case?

It appears to the Court that the case of the Phœnix [5 C. Rob. 20] is precisely in point. In that case a vessel was captured on a voyage from Surinam to Holland, and a part of the cargo was claimed by persons residing in Germany, then a neutral country, as the produce of their estates in Surinam.

The counsel for the captors considered the law of the case as entirely settled. The counsel for the Claimant did not controvert this position. They admitted it; but endeavoured to extricate their case from the general principle by giving it the protection of the treaty of Amiens. In pronouncing his opinion, sir William Scott lays down the general rule thus: "Certainly nothing can be more decided and fixed, as the principle of this Court and of the Supreme Court, upon very solemn arguments, than that the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be. This has been so repeatedly decided, both in this and the superior Court, that it is no longer open to discussion. No question can be made on the point of law, at this day."

Afterwards, in the case of the Vrow Anna Catharina, [5 C. Rob., 161] sir William Scott lays down the rule, and states its reason. "It cannot be doubted," he says, "that there are trans-

actions so radically and fundamentally national as to impress the national character, independent of peace or war, and the local residence of the parties. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation as a holder of the soil, and is to be taken as a part of that country, in that particular transaction, independent of his own personal residence and occupation."

This rule laid down with so much precision, does not, it is contended, embrace Mr. Bentzon's claim, because he has not "incorporated himself with the permanent interests of the nation." He acquired the property while Santa Cruz was a Danish colony, and he withdrew from the island when it became British.

This distinction does not appear to the Court to be a sound one. The identification of the national character of the owner with that of the soil, in the particular transaction, is not placed on the dispositions with which he acquires the soil, or on his general character. The acquisition of land in Santa Cruz binds him, so far as respects that land, to the fate of Santa Cruz, whatever its destiny may be. While that island belonged to Denmark, the produce of the soil, while unsold, was, according to this rule, Danish property, whatever might be the general character of the particular proprietor. When the island became British, the soil and its produce, while that produce remained unsold, were British.

The general commercial or political character of Mr. Bentzon could not, according to this rule, affect this particular transaction. Although incorporated, so far as respects his general character, with the permanent interests of Denmark, he was incorporated, so far as respected his plantation in Santa Cruz, with the permanent interests of Santa Cruz, which was, at that time, British; and though as a Dane, he was at war with Great Britain, and an enemy, yet, as a proprietor of land in Santa Cruz, he was no enemy: he could ship his produce to Great Britain in perfect safety.

The case is certainly within the rule as laid down in the British Courts. The next inquiry is: how far will that rule be adopted in this country?

The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout

Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice: but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the Courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.

Without taking a comparative view of the justice or fairness of the rules established in the British Courts, and of those established in the Courts of other nations, there are circumstances not to be excluded from consideration, which give to those rules a claim to our attention that we cannot entirely disregard. The United States having, at one time, formed a component part of the British empire, *their* prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it.

It will not be advanced, in consequence of this former relation between the two countries, that any obvious misconstruction of public law made by the British Courts, will be considered as forming a rule for the American Courts, or that any recent rule of the British Courts is entitled to more respect than the recent rules of other countries. But a case professing to be decided on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations.

The rule laid down in the Phœnix is said to be a recent rule, because a case solemnly decided before the lords commissioners in 1783, is quoted in the margin as its authority. But that case is not suggested to have been determined contrary to former practice or former opinions. Nor do we perceive any reason for supposing it to be contrary to the rule of other nations in a similar case.

The opinion that the ownership of the soil does, in some degree, connect the owner with the property, so far as respects that soil, is an opinion which certainly prevails very extensively. It is not an unreasonable opinion. Personal property may follow the person anywhere; and its character, if found on the

ocean, may depend on the domicil of the owner. But land is fixed. Wherever the owner may reside, that land is hostile or friendly according to the condition of the country in which it is placed. It is no extravagant perversion of principle, nor is it a violent offense to the course of human opinion to say that the proprietor, so far as respects his interest in this land, partakes of its character; and that the produce, while the owner remains unchanged, is subject to the same disabilities. In condemning the sugars of Mr. Bentzon as enemy property, this Court is of opinion that there was no error, and the sentence is affirmed with costs.

THE DERFFLINGER, (No. 1).

BRITISH PRIZE COURT FOR EGYPT. 1916.
I British and Colonial Prize Cases, 386.

CATOR, P. This is a claim made by Mr. H. E. Wolf, a German subject, for the release of a number of cases of porcelain, curios, and other private effects, consigned by him from Hong Kong to a German firm of forwarding agents in Bremen, who had instructions to send them to Mr. Wolf's home in Stuttgart.

Mr. Wolf is employed in the Chinese Maritime Customs at Shanghai, but no special claim is made on account of his employment, and we are to deal with him as a private gentleman forming part of the German community in Shanghai, and no doubt registered at his Consulate as a German subject resident in China. His affidavit declares and emphasises that the goods in question are his private effects intended for private use in his own home in Germany.

On these facts counsel for the claimant has made a very praiseworthy effort to parry the claim of the Crown for confiscation, and has cited a mass of authority to support his contentions. Put shortly his argument is as follows: The principle of commercial domicile which has been elaborated in our Prize Courts applies to private residents as well as to merchants. This domicile in the case of Mr. Wolf is China. China is a neutral country and Mr. Wolf must be treated as a neutral by the Prize Court, and as such is entitled to have his property returned to him even though he has consigned it to himself in Germany. . . .

The much-quoted case of The Indian Chief (1800), 3 C. Rob. 12, 1 Eng. P. C. 251, decided by Lord Stowell, is directly in

point. We are concerned only with the second part of the judgment—a part which unfortunately has not found a place in the English Prize Cases. The question turned upon the position of Europeans in Oriental countries, and on this subject Lord Stowell says, "In the East, from the oldest times, an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as all their fathers were—*'Doris amara suam non intermiscuit undam';* not acquiring any national character under the general sovereignty of the country, and not trading under any recognized authority of their own original country, they have been held to derive their present character from that of the association or factory under whose protection they live and carry on their trade." (3 C. Rob., at p. 29).

In those days factories, as they were called, still flourished in the Orient. A factory was a community of Europeans established in a foreign country for the purpose of trade, yet owing no allegiance to the ruler of the soil and not much controlled by any other. Although grouped under the protection of one flag, its members might consist of traders belonging to different nations. An Englishman, for instance, might attach himself to a Dutch factory, and if he did so his trade domicile would for the purpose of a British Prize Court be reckoned Dutch. Since that time the grouping has undergone a change. Communities which in those days were not trading under any recognized authority of their own original country have now sorted themselves out into communities of different nations, definitely controlled by their home Governments, which legislate for them in virtue of rights acquired by custom or definitely conceded by native potentates. The trading bond has given way to one of nationality. But allowing for this difference, the words of Lord Stowell are just as applicable in these days as they were more than a hundred years ago. The waters of Alpheus still flow undefiled, and where European Powers enjoy the privilege of ex-territorial jurisdiction their subjects never lose their native character. Each community continues its distinctive existence, governed by its own consuls and subject to the laws of its mother country. . . . There still exist countries where, owing to fundamental differences in race and religion, Europeans do not merge in the general life of the native inhabitants, but keep themselves apart in separate communities; and where such separation is sanctioned by the exercise of ex-territorial authority

I am of opinion that it is impossible for any individual to acquire a trade domicile other than that of the country to which he owes allegiance.

Mr. Wolf is a German subject and a member of the German community in Shanghai, and his domicile for the purpose of these proceedings must be taken to be German. His goods form part of the cargo of an enemy ship which has been confiscated to the Crown, and they must be condemned in like manner. There will be an order for sale in the usual terms.

NOTE.—The nations are sharply divided as to the test that should be applied for the determination of enemy character. In France and the Continental countries generally, nationality is the sole test. Political allegiance practically determines enemy character. Calvo, IV, sec. 1932; Bonfils (Fauchille), sec. 1343. But Great Britain, followed by America and Japan, adopted from Grotius the principle that whatever persons or property are so situated as to be under enemy control and thus to increase the strength of the enemy possess enemy character. This difference in point of view is largely explained by the fact that in the wars waged by Great Britain the preponderance of her navy has made the destruction of enemy commerce one of the chief objects of British strategy and has given to prize law a greater importance than it has in any other country. The Anglo-American principle is denominated trade domicile or commercial domicile, and differs from civil or personal domicile in that it is more easily acquired and abandoned and is restricted to the relation of the persons or property concerned to the war. For further discussions of the Anglo-American-Japanese doctrine of enemy character based upon commercial domicile see The Vigilantia (1798), 1 C. Robinson, 1; The Diana (1803), 5 Ib. 60; The Antonia Johanna (1816), 1 Wheaton, 159; The Pizarro (1817), 2 Ib. 227; The Friendschaft (1819), 4 Ib. 105; The Johanna Emilie (1854), Spinks, 12; The Baltica (1857), 11 Moore, P. C. 141; The Cheshire (1866), 3 Wallace, 231; Mitchell v. United States (1874), 21 Ib. 350; The Rostock (Egypt, 1915), 1 Br. & Col. P. C. 523; The Eumaeus (1915), 32 T. L. R. 125; The Lutzow (No. 4) (Egypt, 1916), 2 Br. & Col. P. C. 122; The Annaberg (Egypt, 1916), 2 Ib. 241. One engaged in trade may have one or more commercial domiciles distinct from his personal or civil domicile, The Matchless (1822), 1 Hagg. Adm. 97; O'Mealey v. Wilson (1808), 1 Camp. 482; The Jonge Klassima (1804), 5 C. Robinson, 297; The Aina (1854), Spinks, 8; The Gerasimo (1857), 11 Moore, P. C. 88. The doctrine has been applied in many situations. A subject of one of the belligerents domiciled in the territory of the other is held to have an enemy character, The Venus (1814), 8 Cranch, 253; and so also of a neutral domiciled in enemy territory, The Herman (1802), 4 C. Robinson, 228. A neutral residing in the enemy's country as consul and engaging in trade there acquires enemy character, The Baltica (1857), 11 Moore, P. C. 141. A resident of enemy territory desiring to show that he does not have enemy character must assume the burden of proof, The Bernon (1799), 1 C. Robinson, 102. On the other hand subjects of a belligerent state who are domiciled in a neutral country are treated as neutrals and may trade with the enemy, The Emanuel (1799), 1 C. Robinson, 296; The Danous (1802), 4 Ib. 255*n*; The Ann (1813), 1 Dodson, 221; while an

enemy subject carrying on business in a neutral country is treated as a friend, The Postilion (1779), Hay & Marriott, 245; The San José Indiano (1814), 2 Gallison, 268. Property may acquire an enemy character even though the neutral owner thereof resides in the state to which he owes allegiance. Property in enemy territory and which is necessarily associated therewith is enemy property regardless of ownership, The Phoenix (1803), 5 C. Robinson, 20; The Jonge Klassima (1804), 5 Ib. 297; The Nina (1854), Spinks, 276; United States v. Farragut (1875), 22 Wallace, 406; Young v. United States (1877), 97 U. S. 39; Briggs v. United States (1890), 25 Ct. Cl. 126. Such property is subject to the same treatment as other enemy property, Juragua Iron Co. v. United States (1909), 212 U. S. 297, unless the owner thereof takes prompt measures upon the outbreak of hostilities to withdraw his property, The Gray Jacket (1867), 5 Wallace, 342. While residence is a neutral country will not protect a merchant's share in a house of trade established in the enemy's country, The William Bagaley (1867), 5 Wallace, 377, residence in an enemy's country will condemn his share in a house established in a neutral country, The Antonia Johanna (1816), 1 Wheaton, 159. Hence in The Clan Grant (1915), 1 Br. & Col. P. C. 272, it was held that two-thirds of the goods in a British ship belonging to a partnership established in Khartoum, two of the three partners being domiciled in Hamburgh, could be confiscated as enemy property. And so also of the property of members of a Japanese limited partnership, The Derfflinger (No. 4.) (Egypt, 1916), 2 Br. & Col. P. C. 102. Even if owned by a loyal citizen of the country of the captor property coming from enemy territory is enemy property, The Frances (1814), 8 Cranch, 335; The Gray Jacket (1867), 5 Wallace, 342. But if a subject of a belligerent state have a house of trade in an enemy country and another in a neutral country, the enemy character of the first does not affect the other, The Portland (1800), 3 C. Robinson, 41. Enemy territory is any territory which the enemy controls and can use for purposes of the war without regard to the title by which he holds it, The Gutenfels (1916), L. R. [1916] 2 A. C. 112. A corporation formed in England, all but one of the shareholders being German, was held not to have an enemy character, Continental Tyre and Rubber Co. v. Daimler (1915), L. R. [1915] 1 K. B. 893, but on appeal to the House of Lords opinion among the judges was much divided, L. R. [1916] 2 A. C. 307. The same principle was applied by the British Prize Court in The Poona (1915), 1 Br. & Col. P. C. 275, and again in The Roumanian (1915), L. R. [1915] P. 26, where it was held that a German corporation is an alien enemy even though some of the shareholders are British. But in The Tommi and The Rothersand (1914), L. R. [1914], P. 251, the court intimated that if a British ship were owned by a British company, all the shareholders being alien enemies, the court would disregard the corporate fiction and look to the real parties in interest. A corporation formed in Belgium which removed its office to England soon after the outbreak of war did not become an enemy company in consequence of the German occupation of Belgium, Société Anonyme Belge des Mines d'Aljustrel (Portugal) v. Anglo-Belgian Agency, Lt. (1915), 31 T. L. R. 624.

Domicile in a country which is based altogether upon residence or commercial interests therein may be terminated by removal, The Diana (1804), 5 C. Robinson, 60; The Ocean (1804), 5 Ib. 90; The Venus (1814), 8 Cranch, 253 (especially Marshall's dissenting opinion); Gates v. Goodloe (1880), 101

U. S. 612; The Juriady (1904), Takahashi, 591. But if such removal is for the purpose of escaping an enemy character, it must take place soon after the outbreak of war. A delay of eleven months is too long, The St. Lawrence (1815), 9 Cranch, 120. The fact that the telegraph and the cable enable one at the present time to inform himself at once as to the outbreak of war and to communicate his decision quickly makes prompt action more necessary than formerly, The Lutzow (No. 4) (Egypt, 1916), 2 Br. & Col. P. C. 122. Domicile of origin easily reverts, especially in war time, and is more easily proven than is the assumption or the continuance of a neutral domicile by an enemy subject, La Virginie (1804), 5 C. Robinson, 98; The Ann Green (1812), 1 Gallison, 274; The Flamenco, The Orduna (1915), 1 Br. & Col. P. C. 509. One who takes early steps to withdraw from enemy territory is entitled to the restitution of his property even though his withdrawal may have been prevented by forcible detention, The Dree Gebroeders (1802), 4 C. Robinson, 232; The Ocean (1804), 5 Ib. 90; The Juffrow Catherina (1804), 5 Ib. 141; The Gerasimo (1857), 11 Moore, P. C. 88.

On the whole subject of enemy character see Cobbett, *Cases and Opinions*, II, 19, and Moore, *Digest*, VII, 424.

Section 3. The Status of Alien Enemies.

EX PARTE BELLI.

Supreme Court of South Africa. 1914.
S. A. Law Reports [1914], C. P. D., Part 1, 742.

Maasdorp, J. P. The petitioner in this case says that he is a German subject, that he arrived in this country as far back as the year 1906, and that he has since been employed in the service of certain dentists, who practise in this town. Lately he was called upon as a German subject, by some notice put in the papers to report himself from time to time at the magistrate's court. This injunction he seems to have observed, but later on he received a further injunction requiring him to present himself, equipped in a certain way, in order that he might be removed to the Transvaal. . . . Petitioner now asks the Court to protect him from this injunction. on the ground that it is illegal. . . .

A great deal of authority has been cited at the Bar which deals very generally with the rights of alien subjects and enemy subjects, and I think the matter may be narrowed down largely to merely considering now what the position of the petitioner is in this particular case, and I cannot do better, in order to abridge my remarks as much as possible, than refer to the posi-

tive law of the country and international law, as laid down by Halleck in his work on International Law. He states, in chapter 17, section 13: "One of the immediate consequences of the position in which the citizens and subjects of belligerent States are placed by the declaration of war is that all the subjects of one of the hostile Powers within the territory of the other are liable to be seized and retained as prisoners of war." If this is a correct statement of the law, then the petitioner in this case would be liable to be seized and detained as a prisoner of war. That, on the face of it, appears to be a very harsh rule, but it may be administered in a lenient manner, so as to cause as little prejudice as possible, and different nations have, in dealing with this rule, modified it and mitigated its harsh character. In the passage immediately following, Halleck says: "But this extreme right, founded on the positive law of nations, has been stripped of much of its rigour in modern warfare by the milder rules resulting from the usage of nations, the stipulations of treaties, and the municipal laws, and ordinances of particular States."

It would, therefore, follow that in the necessities of war it might at times be necessary for the State to use what appeared to be harsher measures than at other times. The right exists to enforce the rule that has been stated, and the only question is as to the manner in which it should be employed, and the discretion in that respect is in the Government of the country, because there is no positive rule of law in the country which this Court can enforce in order to prevent the Government from using its discretion in the matter. Halleck gives the different instances in which from time to time this rule has become milder in its application, and he concludes thus: "Other nations have made similar decrees, but, however strong the current of modern authority in favor of the milder principle, nevertheless the ancient and stricter rule must still be regarded as the law of nations." That being the law of nations—and we are now asked to enforce the law of nations—it would appear that the law we are called upon to enforce is a law that leaves the whole matter in the discretion of the Government. There is one passage more I desire to quote from Halleck, in which he deals with enemy property found in a country at a time when war has been declared: "What we have said of the detention of the enemy's person holds good with respect to the right to seize and confiscate that enemy's property found within territory of the other belligerent at the commencement of hostilities. In former

times this right was exercised with great rigour, but it has now become an established, though not an inflexible rule of international law, that such property is not liable to confiscation as a prize of war." Now, although he describes this rule as a rule of international law, he goes on to say, " 'This rule,' says Marshall, C. J., 'like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the Sovereign, it is a guide which he follows or abandons at his will; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. It is not an immutable rule of law, but depends on political considerations, which may continually vary.' "

Without making any further general remarks, I may refer to one more authority in Vol. 14 of the Encyclopedia of the Laws of England (p. 564), viz.: "The question whether a belligerent State should allow subjects of the State with which it is at war to remain in the country or not is entirely governed by the necessities of war." All these amendments of international law are subject to the necessities of war. The "necessities of war" is a matter that this Court cannot deal with. It is a matter really within the knowledge and affects the discretion of the Government, and it would seem from the petition which has been put in that the Government of this country, acting through the authorities which are mentioned as dealing with this particular case at the magistrate's court, consider it advisable that certain enemy subjects, they being German subjects, should for the present be removed from certain parts of the country to another part of the country. So far as we know, there is no intention to deal harshly with these people. They are simply removed from this part of the country to the Transvaal. That is all the petition tells us, and, although it may be a hardship, I have no doubt that the instructions here given by the Government under the necessities of the case will be carried out in such a way as to cause as little hardship to those who come under it as possible. What the petitioner says is that he has been illegally treated. He has not satisfied the Court that he has been illegally treated, and he should have satisfied the Court by pointing out some law in this country under which the Court can protect him, and he has certainly failed to do so. Under the circumstances, I think the application must be refused.

NOTE.—The status of alien enemies is determined by the municipal law of the country where they are found. And the Anglo-American rules have usually been much harsher toward the alien than have the rules in continental countries. The distinction between alien enemy and alien friend is in Eng-

lish law as old at least as Magna Charta, (see ch. 42). When England was overrun with foreigners, especially court favorites, the distinction seems to have been lost sight of, but in the fifteenth century it was revived (Littleton, *Tenures,* 198), and the plea of alien enemy came to be recognized as a sufficient defense to any personal action which he might bring. But as early as Calvin's Case (1608), 7 Reports, 18*a*, distinctions began to be made. There was the "*inimicus permissus,* an enemy that cometh into the realm by the King's safe conduct,"—a favored person, who in Wells v. Williams (1698), 1 Lord Raymond, 282, was allowed to sue because he enjoyed the King's protection. A century later Chancellor Kent gave emphatic utterance to the governing principle when he said in Clarke v. Morey (1813), 10 Johnson (N. Y.), 69:

> A lawful residence implies protection and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy no less than to justice and humanity.

The English courts, however, did not adopt Kent's view that if an alien was lawfully residing in the kingdom he had capacity to sue. This was denied in Alciator v. Smith (1812), 3 Campbell, 245, and in Alcinous v. Nigreu (1854), 4 E. & B. 217. But the effect of these decisions has been largely nullified by the recent cases in which it has been held that registration according to law carries with it the protection of the government, Princess of Thurn und Taxis v. Moffitt (1914), 112 L. T. Rep. 114, and is evidence of license to remain, Porter v. Freudenberg (1915), L. R. [1915] 1 K. B. 857. But without such protection the alien enemy in England was practically an outlaw. In Sylvester's Case (1701), 7 Modern, 150, the court said:

> If an alien enemy come into England without the Queen's protection he shall be seized and imprisoned by the law of England and he shall have no advantage of the law of England nor for any wrong done to him here.

For a good discussion of the early cases see the opinion of Justice Story in Society for the Propagation of the Gospel v. Wheeler (1814), 2 Gallison, 105. See also Page, *War and Alien Enemies.*

Section 4. The Effect of War on Treaties Between Belligerents.

THE SOCIETY FOR THE PROPAGATION OF THE GOSPEL IN FOREIGN PARTS v. THE TOWN OF NEW-HAVEN, AND WILLIAM WHEELER.

Supreme Court of the United States. 1823.
8 Wheaton, 464.

This case came before the Court upon a certificate of a division in opinion of the Judges of the Circuit Court for the District of

Vermont. It was an action of ejectment, brought by the plaintiffs against the defendants, in that Court. . . . By a charter granted by William III . . . a number of persons, subjects of England . . . were incorporated by the name of "The Society for the Propagation of the Gospel in Foreign Parts" . . . The corporation has ever since existed, and now exists, as an organized body politic and corporate, in England, all the members thereof being subjects of the king of Great Britain. On the 2d of November, 1761, a grant was made by the governor of the province of New Hampshire, in the name of the king, by which a certain tract of land . . . so granted, was to be incorporated into a town, by the name of New-Haven, and to be divided into sixty-eight shares, one of which was granted to "The Society for the Propagation of the Gospel in Foreign Parts." . . . On the 30th of October, 1794, the Legislature of Vermont passed an act, declaring that the rights to land in that State, granted under the authority of the British government previous to the revolution, to "The Society for the Propagation of the Gospel in Foreign Parts," were thereby granted severally to the respective towns in which such lands lay. . . . Under this law, the selectmen of the town of New-Haven executed a perpetual lease of a part of the demanded premises, to the defendant, William Wheeler. . . .

Mr. Justice Washington delivered the opinion of the Court: . . .

It has been contended by the counsel for the defendants,

1st. That the capacity of the plaintiffs, as a corporation, to hold lands in Vermont, ceased by, and as a consequence of, the revolution.

2dly. That the society being, in its politic capacity, a foreign corporation, it is incapable of holding land in Vermont, on the ground of alienage; and that its rights are not protected by the treaty of peace.

3dly. That if they were so protected, still the effect of the last war between the United States and Great Britain, was to put an end to that treaty, and, consequently, to rights derived under it, unless they had been revived by the treaty of peace, which was not done. . .

2. The next question is, was this property protected against forfeiture, for the cause of alienage, or otherwise, by the treaty of peace? This question, as to real estates belonging to British subjects, was finally settled in this Court, in the case of Orr v.

Hodgson (4 Wheat. Rep. 453), in which it was decided, that the 6th article of the treaty protected the titles of such persons, to lands in the United States, which would have been liable to forfeiture, by escheat, for the cause of alienage, or to confiscation, *jure belli.*

The counsel for the defendants did not controvert this doctrine, so far as it applies to natural persons; but he contends, that the treaty does not, in its terms, embrace corporations existing in England, and that it ought not to be so construed. The words of the 6th article are, "there shall be no future confiscations made, nor any prosecutions commenced, against any person or persons, for or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage, either in his person, liberty or property," &c.

The terms in which this article is expressed are general and unqualified, and we are aware of no rule of interpretation applicable to treaties, or to private contracts, which would authorize the Court to make exceptions by construction, where the parties to the contract have not thought proper to make them. Where the language of the parties is clear of all ambiguity, there is no room for construction. Now, the parties to this treaty have agreed, that there shall be no future confiscations in any case, for the cause stated. How can this Court say, that this is a case where, for the cause stated, or for some other, confiscation may lawfully be decreed? We can discover no sound reason why a corporation existing in England may not as well hold real property in the United States, as ordinary trustees for charitable, or other purposes; or as natural persons for their own use. We have seen, that the exemption of either, or all of those persons, from the jurisdiction of the Courts of the State where the property lies, affords no such reason.

It is said, that a corporation cannot hold lands, except by permission of the sovereign authority. But this corporation did hold the land in question, by permission of the sovereign authority before, during, and subsequent to the revolution, up to the year 1794, when the Legislature of Vermont granted it to the town of New-Haven; and the only question is, whether this grant was not void by force of the 6th article of the above treaty? We think it was. . .

But even if it were admitted that the plaintiffs are not within the protection of the treaty, it would not follow, that their right to hold the land in question was devested by the act of 1794, and

became vested in the town of New-Haven. At the time when this law was enacted, the plaintiffs, though aliens, had a complete, though defeasible, title to the land, of which they could not be deprived for the cause of alienage, but by an inquest of office; and no grant of the State could, upon the principles of the common law, be valid, until the title of the State was so established. (Fairfax's Devisee v. Hunter's Lessee, 7 Cranch's Rep. 503.) Nor is it pretended by the counsel for the defendants, that this doctrine of the common law was changed by any statute law of the State of Vermont, at the time when this land was granted to the town of New-Haven. This case is altogether unlike that of Smith v. The State of Maryland, (6 Cranch's Rep. 286,) which turned upon an act of that State, passed in the year 1780, during the revolutionary war, which declared, that all property within the State, belonging to British subjects, should be seized, and was thereby confiscated to the use of the State; and that the commissioners of confiscated estates should be taken as being in the actual seisin and possession of the estates so confiscated, without any office found, entry, or other act to be done. The law in question passed long after the treaty of 1783, and without confiscating or forfeiting this land, (even if that could be legally done) grants the same to the town of New-Haven.

3. The last question respects the effect of the late war, [the War of 1812] between Great Britain and the United States, upon rights existing under the treaty of peace. Under this head, it is contended by the defendants' counsel, that although the plaintiffs were protected by the treaty of peace, still, the effect of the last war was to put an end to that treaty, and, consequently, to civil rights derived under it, unless they had been revived and preserved by the treaty of Ghent.

If this argument were to be admitted in all its parts, it nevertheless would not follow, that the plaintiffs are not entitled to a judgment on this special verdict. The defendants claim title to the land in controversy solely under the act of 1794, stated in the verdict, and contend, that by force of that law, the title of the plaintiffs was devested. But if the Court has been correct in its opinion upon the first two points, it will follow, that the above act was utterly void, being passed in contravention of the treaty of peace, which, in this respect, is to be considered as the supreme law. Remove that law, then, out of the case, and the title of the plaintiffs, confirmed by the treaty of 1794, remains unaffected by the last war, it not appearing from the verdict, that the land

was confiscated, or the plaintiffs' title in any way devested, during the war, or since, by office found, or even by any legislative act.

But there is a still more decisive answer to this objection, which is, that the termination of a treaty cannot devest rights of property already vested under it.

If real estate be purchased or secured under a treaty, it would be most mischievous to admit, that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights, than the repeal of a municipal law affects rights acquired under it. If, for example, a statute of descents be repealed, it has never been supposed, that rights of property already vested during its existence, were gone by such repeal. Such a construction would overturn the best established doctrines of law, and sap the very foundation on which property rests.

But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.

We think, therefore, that treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.

A majority of the Court is of opinion, that judgment upon

this special verdict ought to be given for the plaintiffs, which opinion is to be certified to the Circuit Court.

Certificate for the plaintiffs.

NOTE.—See The Frau Ilsabe (1801), 4 C. Robinson, 63; Carneal v. Banks (1825), 10 Wheaton, 181; Sutton v. Sutton (1830), 1 Russel & Mylne, 663. As to the nature of the treaty of peace of 1783 between Great Britain and the United States, see M'Ilvaine v. Coxe's Lessee (1808), 4 Cranch, 209; Harcourt v. Gaillard (1827), 12 Wheaton, 523. The character of the treaty of 1783 played an important part in the American argument in the North Atlantic Fisheries Arbitration. For further discussion of the subject, see Crandall, *Treaties—Their Making and Enforcement*, sec. 181; Butler, *The Treaty-Making Power of the United States;* Wheaton (Dana), 342, (Phillipson), 368; Pitt Cobbett, *Cases and Opinions*, II. 35; Moore, *Digest*, V. sec. 779, 780; Bonfils (Fauchille), 693.

SECTION 5. THE EFFECT OF WAR ON INTERCOURSE BETWEEN ENEMY SUBJECTS.

THE HOOP.

HIGH COURT OF ADMIRALTY OF GREAT BRITAIN. 1799.
1 C. Robinson, 196.

This is a case of a claim of several British merchants for goods purchased on their account in Holland, and shipped on board a neutral vessel. . . . Mr. Malcom of Glasgow, and several other merchants of North Britain, had, long prior to hostilities, been used to trade extensively with Holland; . . . after the irruption of the French into Holland, they had constantly applied for, and obtained special orders of his majesty in council permitting them to continue that trade; [but] after the passing of the acts of parliament 35 G. 3. c. 15. § 80., 36 G. 3. c. 76., 37 G. 3. c. 12 . . . it was apprehended in that part of Great Britain, that by these acts the importation of such goods was made legal: but for the greater security, they still made application to the commissioners of customs at Glasgow, to know what they considered to be the interpretation of the said acts, and whether his majesty's license was still necessary; and . . . were informed, under the opinion of the law advisers of the said commissioners, that no such orders of council were necessary, and that all goods brought from the United Provinces would in future be entered without them; and that in consequence of such information, they had caused the goods in ques-

tion to be shipped at Rotterdam for their account; ostensibly documented for Bergen to avoid the enemy's cruisers. . . .

Sir W. Scott [Lord Stowell] . . . It is said that these circumstances compose a case entitled to great indulgence; and I do not deny it. But if there is a rule of law on the subject binding the Court, I must follow where that rule leads me; though it leads to consequences which I may privately regret, when I look to the particular intentions of the parties.

In my opinion there exists such a general rule in the maritime jurisprudence of this country, by which all trading with the public enemy, unless with the permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek as an universal principle of law.—*Ex naturâ belli commercia inter hostes cessare non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis declarant,* &c. He proceeds to observe, that the interests of trade, and the necessity of obtaining certain commodities have sometimes so far overpowered this rule, that different species of traffic have been permitted, *prout e re sua, subditorumque suorum esse censent principes* (Bynk. Q. J. P. B. 1, c. 3). But it is in all cases the act and permission of the sovereign. Wherever that is permitted, it is a suspension of the state of war *quoad hoc.* It is, as he expresses it, *pro parte sic bellum, pro parte pax inter subditos utriusque principis.* It appears from these passages to have been the law of Holland; Valin, l. iii., tit. 6, art. 3, states it to have been the law of France, whether the trade was attempted to be carried on in national or in neutral vessels; it will appear in a case which I shall have occasion to mention (The Fortuna), to have been the law of Spain; and it may, I think, without rashness be affirmed to have been a general principle of law in most of the countries of Europe.

By the law and constitution of this country, the sovereign alone has the power of declaring war and peace—He alone therefore who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and of commerce merely, and

possibly on grounds of private advantage not very reconcilable with the general interest of the state. It is for the state alone, on more enlarged views of policy, and of all circumstances which may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. In my opinion, no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the state. Who can be insensible to the consequences that might follow, if every person in a time of war had a right to carry on a commercial intercourse with the enemy, and under colour of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if necessary) under the eye and controul of the government, charged with the care of the public safety?

Another principle of law, of a less politic nature, but equally general in its reception and direct in its application, forbids this sort of communication as fundamentally inconsistent with the relation at that time existing between the two countries; and that is, the total inability to sustain any contract by an appeal to the tribunals of the one country, on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain in the language of the civilians *a persona standi in judicio.* The peculiar law of our own country applies this principle with great rigour.—The same principle is received in our courts of the law of nations; they are so far British courts, that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hâc vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the king's peace *pro hâc vice.* But otherwise he is totally *ex lex;* even in the case of ransoms which were contracts, but contracts arising *ex jure belli,* and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill; but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country, for the recovery of his freedom. A state in which contracts cannot be enforced, cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of

justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? to such transactions it gives no sanction; they have no legal existence; and the whole of such commerce is attempted without its protection and against its authority. Bynkershoek expresses himself with great force upon this argument in his first book, chapter 7, where he lays down that the legality of commerce and the mutual use of courts of justice are inseparable: he says, that cases of commerce are undistinguishable from cases of any other species in this respect—*Si hosti semel permittas actiones exercere, difficile est distinguere ex quâ causâ oriantur, nec potui animadvertere illam distinctionem unquam usu fuisse servatam.*

Upon these and similar grounds it has been the established rule of law of this Court, confirmed by the judgment of the supreme court, that a trading with the enemy, except under a royal license, subjects the property to confiscation:—and the most eminent persons of the law sitting in the supreme courts have uniformly sustained such judgments. . . . [A considerable number of English decisions are here reviewed.]

I omit many other cases of the last and the present war merely on this ground that the rule is so firmly established, that no one case exists which has been permitted to contravene it.—For I take upon me to aver, that all cases of this kind which have come before that tribunal have received an uniform determination. The cases which I have produced prove that the rule has been rigidly enforced:—where acts of parliament have on different occasions been made to relax the navigation-law and other revenue acts; where the government has authorized, under the sanction of an act of parliament, a homeward trade from the enemy's possessions, but has not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence; that it has been enforced, where strong claim not merely of convenience, but almost of necessity, excused it on behalf of the individual; that it has been enforced where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities; and that it has been enforced not only against the subjects of the crown, but likewise against those of its allies in the war, upon the supposition that the rule was founded on a strong and universal principle, which allied states in war had a right to notice and apply, mutually, to each other's subjects. Indeed it is the less necessary to produce these cases, because it is ex-

pressly laid down by Lord Mansfield, as I understand him, that such is the maritime law of England. (Gist v. Mason, 1 T. R., 85.) . . .

A reference has been made to the statutes.—It is not argued that the statutes will, in a just apprehension of them, authorize such a trade, but that they might have led to an innocent mistake on the subject. . . . I may feel greatly for the individuals who, I have reason to presume, acted ignorantly under advice that they thought safe: but the Court has no power to depart from the law which has been laid down, and I am under the necessity of rejecting the claims.

HANGER v. ABBOTT.

SUPREME COURT OF THE UNITED STATES. 1868.
6 Wallace, 532.

Error to the Circuit Court for the Eastern District of Arkansas.

J. & E. Abbott, of New Hampshire, sued Hanger, of Arkansas, in assumpsit. The latter pleaded the statute of limitations of Arkansas, which limits such action to three years. The former replied the rebellion, which broke out after the cause of action accrued, and closed for more than three years all lawful courts. On demurrer, and judgment against it, and error to this court, the question here was simply, whether the time during which the courts in Arkansas were closed on account of the rebellion, was to be excluded from the computation of time fixed by the Arkansas statute of limitations within which suits on contracts were to be brought, there being no exception by the terms of the statute itself for any such case.

Mr. Justice CLIFFORD delivered the opinion of the court. . . .

Proclamation of blockade was made by the President on the nineteenth day of April, 1861, and, on the thirteenth day of July, in the same year, Congress passed a law authorizing the President to interdict all trade and intercourse between the inhabitants of the States in insurrection and the rest of the United States. 12 Stat. at Large, 1258-257.

War, when duly declared or recognized as such by the war-making power, imports a prohibition to the subjects, or citizens, of all commercial intercourse and correspondence with citizens

or persons domiciled in the enemy's country. The William Bagaley, 5 Wallace, 405; Jecker et al. v. Montgomery, 18 Howard, 111; Wheaton on Maritime Captures, 209. Upon this principle of public law it is the established rule in all commercial nations, that trading with the enemy, except under a government license, subjects the property to confiscation, or to capture and condemnation. The Rapid, 8 Cranch, 155; The Hoop, 1 Robinson Admiralty, 196.

Partnership with a foreigner is dissolved by the same event which makes him an alien enemy, because there is in that case an utter incompatibility created by operation of law between the partners as to their respective rights, duties, and obligations, both public and private, which necessarily dissolves the relation, independent of the will or acts of the parties. Maclachlan on Shipping, 475; Story on Partnership, § 316; Griswold v. Waddington, 15 Johnson, 57; Same case, 16 Id. 438. Direct consequence of the rule as established in those cases is, that as soon as war is commenced all trading, negotiation, communication, and intercourse between the citizens of one of the belligerents with those of the other, without the permission of the government, is unlawful. No valid contract, therefore, can be made, nor can any promise arise by implication of law, from any transaction with an enemy. Exceptions to the rule are not admitted; and even after the war has terminated, the defendant, in an action founded upon a contract made in violation of that prohibition, may set up the illegality of the transaction as a defence. Willison v. Patteson, 7 Taunton, 439. . . .

Executory contracts also with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are dissolved by the declaration of war, which operates for that purpose with a force equivalent to an act of Congress. Esposito v. Bowden, 4 Ellis & Blackburne, 963; Same case, 7 Id. 763.

In former times the right to confiscate debts was admitted as an acknowledged doctrine of the law of nations, and in strictness it may still be said to exist, but it may well be considered as a naked and impolitic right, condemned by the enlightened conscience and judgment of modern times. Better opinion is that executed contracts, such as the debt in this case, although existing prior to the war, are not annulled or extinguished, but the remedy is only suspended, which is a necessary conclusion, on account of the inability of an alien enemy to sue or to sustain,

in the language of the civilians, *a persona standi in judicio.* 1 Kent's Com. (11th ed.), 76; Flindt v. Waters, 15 East. 260.

Trading, which supposes the making of contracts, and which also involves the necessity of intercourse and correspondence, is necessarily contradictory to a state of war, but there is no exigency in war which requires that belligerents should confiscate or annul the debts due by the citizens of the other contending party.

We suspend the right of the enemy, says Mr. Chitty, to the debts which our traders owe to him, but we do not annul the right. We preclude him during war from suing to recover his due, for we are not to send treasure abroad for the direct supply of our enemies in their attempt to destroy us, but with the return of peace we return the right and the remedy. Chitty on C. & M. 423. . . . Views of Mr. Wheaton are, and they are undoubtedly correct, that debts previously contracted between the respective subjects, though the remedy for their recovery is suspended during war, are revived on the restoration of peace, unless actually confiscated in the meantime in the rigorous exercise of the strict rights of war, contrary to the milder rules of recent times. . . . Wheaton's International Law, by Lawrence, 541-877. . . .

When our ancestors immigrated here, they brought with them the statute of 21 Jac. 1, c. 16, entitled "An act for limitation of actions, and for avoiding of suits in law," known as the statute of limitations. . . . Such statutes exist in all the States. . . .

Persons within the age of twenty-one years, *femes covert, non compos mentis,* persons imprisoned or beyond the seas, were excepted out of the operation of the third section of the act, and were allowed the same period of time after such disability was removed. Just exceptions indeed are to be found in all such statutes, but when examined it will appear that they were framed to prevent injustice and never to encourage laches or to promote negligence. Cases where the courts of justice are closed in consequence of insurrection or rebellion are not within the express terms of any such exception, but the statute of limitations was passed in 1623, more than a century before it came to be understood that debts due to alien enemies were not subject to confiscation. Down to 1737, says Chancellor Kent, the opinion of jurists was in favor of the right to confiscate, and many maintained that such debts were annulled by the declaration of war. Regarding such debts as annulled by war, the law-makers

of that day never thought of making provision for the collection of the same on the restoration of peace between the belligerents. Commerce and civilization have wrought great changes in the spirit of nations touching the conduct of war, and in respect to the principles of international law applicable to the subject.

Constant usage and practice of belligerent nations from the earliest times subjected enemy's goods in neutral vessels to capture and condemnation as prize of war, but the maxim is now universally acknowledged that "free ships make free goods" which is another victory of commerce over the feelings of avarice and revenge. Individual debts, as a general remark, are no longer the subject of confiscation, and the rule is universally admitted that if not confiscated during the war, the return of peace brings with it both "the right and the remedy." Wolf v. Oxholm, 6 Maule & Selwyn, 92. . . .

Old decisions, made when the rule of law was that war annulled all debts between the subjects of the belligerents, are entitled to but little weight, even if it is safe to assume that they are correctly reported, of which, in respect to the leading case of Prideaux v. Webber, 1 Levinz, 31, there is much doubt. Miller v. Prideaux, 1 Keble, 157; Lee v. Rogers, 1 Levinz, 110; Hall v. Wybourne, 2 Salked., 420; Aubrey v. Fortescue, 10 Modern, 205, are of the same class, and to the same effect. All of those decisions were made between parties who were citizens of the same jurisdiction, and most of them were made nearly a hundred years before the international rule was acknowledged, that war only suspended debts due to an enemy, and that peace had the effect to restore the remedy. The rule of the present day is, that debts existing prior to the war, but which made no part of the reasons for undertaking it, remain entire, and the remedies are revived with the restoration of peace. . . .

Text writers usually say, on the authority of the old cases referred to, that the non-existence of courts, or their being shut, is no answer to the bar of the statute of limitations, but Plowden says that things happening by an invincible necessity, though they be against common law, or an act of Parliament, shall not be prejudicial, that, therefore, to say that the courts were shut, is a good excuse on voucher of record. Brooke, tit. Failure of Record; Blanshard on Limitations, 163; 6 Bacon's Ab. 395; 1 Plowden, 9 b. Exceptions not mentioned in the statutes have sometimes been admitted, and this court held that the time which elapsed while certain prior proceedings were suspended by appeal, should be deducted, as it appeared that the injured

party in the meantime had no right to demand his money, or to sue for the recovery of the same; and in view of those circumstances, the court decided that his right of action had not accrued so as to bar it, although not commenced within six years. Montgomery v. Hernandez, 12 Wheaton, 129. But the exception set up in this case stands upon much more solid reasons, as the right to sue was suspended by the acts of the government, for which all the citizens are responsible. Unless the rule be so, then the citizens of a State may pay their debts by entering into an insurrection or rebellion against the government of the Union, if they are able to close the courts, and to successfully resist the laws, until the bar of the statute becomes complete, which cannot for a moment be admitted. Peace restores the right and the remedy, and as that cannot be if the limitation continues to run during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the statute is also suspended during the same period. . . .

Judgment affirmed with costs.

NOTE.—Accord: Hoare v. Allen (1789), 2 Dallas (Penn.), 102; United States v. Wiley (1871), 11 Wallace, 508; The Protector (1872), 12 Ib., 700; Semmes v. Hartford Insurance Co. (1872), 13 Ib., 158; Brown v. Hiatts (1873), 15 Ib. 177. Whether the principal case would be followed in Great Britain is doubtful. Westlake (II, 49), Pollock (*Contracts,* 86), and Phillipson (*Effect of War on Contracts,* 76) support it, but there is a dictum to the contrary in DeWahl v. Braune (1856), 1 H. & N. 178, which is adopted by Anson (*Contracts,* 129) and Lord Lindley (*Company Law,* I, 53).

Analogous to the effect of war on the running of the Statute of Limitations is the effect of war on the running of interest on debts during the period in which the debtor and creditor, subjects of enemy states, are forbidden to have intercourse, and hence the payment of interest from one to the other is unlawful. Authority is divided, but seems to favor the rule that interest does not run when the debtor and creditor are separated by the line of war. See Du Belloix v. Lord Waterpark (1822), 1 Dowling and Ryland, 16; Brown v. Hiatts (1873), 15 Wallace 177. The subject is fully treated by C. N. Gregory, "Interest on Debts where Intercourse between Debtor and Creditor is forbidden by a State of War," *Law Quar. Rev.,* XXV, 297.

KERSHAW v. KELSEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1869.
100 Massachusetts, 561.

[The defendant, a citizen of Massachusetts, being in Mississippi, took in February, 1864, a lease of the plaintiff's planta-

tion, and agreed to pay a rent of $10,000, half in cash and half out of the cotton crop to be grown thereon. Shortly after, he was driven out by Confederate soldiers and returned to Boston. The plaintiff then took possession of the plantation, harvested the crops, and delivered them to the defendant's son by whom they were forwarded to the defendant in Boston and sold. The plaintiff sues for the rent still due on the lease. The defendant contends that such a lease constituted trading between enemies contrary to the principles of international law and in contravention of the terms of the act of Congress of 1861, c. 3, § 5, and the President's proclamation thereunder. The trial judge ruled that the contract was legal.]

GRAY, J. . . . This case presents a very interesting question, requiring for its decision a consideration of fundamental principles of international law. It is universally admitted that the law of nations prohibits all commercial intercourse between belligerents, without a license from the sovereign. Some *dicta* of eminent judges and learned commentators would extend this prohibition to all contracts whatever. In a matter of such grave importance, the safest way of arriving at a right result will be to examine with care the principal adjudications upon the subject. . . . [Here follows an elaborate examination of the authorities.]

The result is, that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection; as well as any act or contract which tends to increase his resources; and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or by orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmissions, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the text books are taken from the *dicta* which we have already examined, and in none of them is any other example given than those just mentioned. At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between

their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war.

The trading or transmission of property or money which is prohibited by international law is from or to one of the countries at war. An alien enemy residing in this country may contract and sue like a citizen. 2 Kent Com., 63. When a creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the amount of the debt, throughout the war, payment then to such creditor or his agent can in no respect be construed into a violation of the duties imposed by a state of war upon the debtor; it is not made to an enemy, in contemplation of international or municipal law; and it is no objection that the agent may possibly remit the money to his principal in the enemy's country; if he should do so, the offence would be imputable to him, and not to the person paying him the money. Conn v. Penn., Pet. C. C. 496. Denniston v. Imbrie, 3 Wash. C. C. 396. Ward v. Smith, 7 Wallace, 447. Buchanan v. Curry, 19 Johns. 137. The same reasons cover an agreement made in the enemy's territory to pay money there out of funds accruing there and not agreed to be transmitted from within our own territory; for, as was said by the Supreme Court of New York in the case last cited, "the rule is founded in public policy, which forbids, during war, that money or other resources shall be transferred so as to aid or strengthen our enemies. The crime consists in exporting the money or property, or placing it in the power of the enemy."

The lease now in question was made within the rebel territory where both parties were at the time, and would seem to have contemplated the continued residence of the lessee upon the demised premises throughout the term; the rent was in part paid on the spot, and the residue, now sued for, was to be paid out of the produce of the land; and the corn, the value of which is sought to be recovered in this action, was delivered and used thereon. No agreement appears to have been made as part of or contemporaneously with the lease, that the cotton crop should be transported, or the rent sent back, across the line between the belligerents; and no contract or communication appears to have been made across that line, relating to the lease, the delivery of possession of the premises or of the corn, or the payment of the rent of the one or the value of the other. The subsequent forwarding of the cotton by the defendant's son from Mississippi to Massachusetts may have been unlawful; but that cannot affect

the validity of the agreements contained in the lease. Neither of these agreements involved or contemplated the transmission of money or property, or other communication, between the enemy's territory and our own. We are therefore unanimously of opinion that they did not contravene the law of nations or the public acts of the government, even if the plantation was within the enemy's lines; and that the plaintiff, upon the case reported, is entitled to recover the unpaid rent, and the value of the corn. . . .

JANSON v. DRIEFONTEIN CONSOLIDATED MINES, LIMITED.

HOUSE OF LORDS OF GREAT BRITAIN. 1902.
Law Reports, [1902] Appeal Cases, 484.

The respondents, a company registered under the law of the South African Republic, in August, 1899, insured, with the appellants and other underwriters, gold against (*inter alia*) "arrests, restraints, and detainments of all kings, princes, and people," during its transit from the Gold Mines near Johannesburg in the Transvaal to the United Kingdom. On October 2, 1899, the gold was during its transit seized on the frontier by order of the Government of the South African Republic. On October 11 at 5 P. M. a state of war began between the British Government and the Government of the Republic. At the time of the seizure war was admitted to be imminent. The respondent company had a London office, but its head office was at Johannesburg. Most of its shareholders were resident outside of the Republic and were not subjects thereof. The respondent company having brought an action against the appellant upon the policy, it was agreed between the parties that the action should be treated as if brought at the conclusion of the war. . . . The action was tried without a jury before Mathew J., who held that the appellant was liable, [1900] 2 Q. B. 339. This decision was affirmed by the Court of Appeal (A. L. SMITH M. R. and ROMER L. J., VAUGHAN WILLIAMS L. J., dissenting), [1901] 2 K. B. 419.

EARL OF HALSBURY, L. C. My Lords, in this case the plaintiffs, who had effected a policy at Lloyd's on a large quantity of gold which was being consigned from South Africa to London,

sue on this policy, dated August 1, 1899, in respect of a seizure by the Transvaal Government of the gold in question on October 2 of the same year. There is no doubt that the loss of the gold is covered by the express words of the policy in question, and the defence to the action rests upon the proposition that the policy was an unlawful contract.

It might be the subject of debate whether I am correct in assuming what I assume for the purpose of my judgment, but for the sake of clearness I do assume that the plaintiff company was an alien, a subject of the Transvaal Government. I also assume, though this also might be the subject of debate, that both parties to the contract had in their minds, on August 1, the possibility and even the probability of war. The making of the policy and the loss under it both accrued before the breaking out of war, which it is agreed between the parties occurred at 5 o'clock on October 11.

All the judges, with the exception of Vaughan Williams, L. J., have held that the plaintiffs are entitled to recover upon the policy; and if I rightly understand the reasoning of the learned Lord Justice, he thinks the policy was in its inception illegal, and would have been equally illegal even if no war had intervened. He does indeed say that there could have been no claim if war had not occurred; but he is mistaken, since the assumed imminence of the war and the seizure by the Transvaal Government might have occurred even if war had finally been averted.

The difficulty I have in dealing with the learned judge's judgment is that I do not trace any definite proposition as to what interest of the State, or what public injury, is supposed by him to be involved; but at all events, in whatever sense the learned judge uses this phrase, it is upon this general ground alone that he decides against the plaintiffs.

Now, as I have said, I understand the judgment of Vaughan Williams, L. J., is put upon the sole ground that this policy is against public policy. He puts it at various parts of his judgment in different ways. He calls it a contravention of public interest, injurious to the country, inconsistent with public duty, repugnant to the interests of the State, and no doubt there are equivalent phrases to be found in many judgments where their application is expounded; but the learned judge, beyond using these phrases, does not go on to explain in what sense they are used, and how and on what principles of law the policy in question was unlawful. . . . In treating of various branches of the law learned persons have analyzed the sources of the law,

and have sometimes expressed their opinion that such and such a provision is bad because it is contrary to public policy; but I deny that any Court can invent a new head of public policy. . . .

If this is the true view, it is not difficult to solve the question whether a contract of insurance made before a war and sought to be enforced in respect of a loss incurred before the war is illegal, either in its inception or at the date when the loss was incurred. However stated it amounts to this—that the thing done must be in its nature an assistance to the public enemy, and if there be no public enemy there can be no aid given to him. Nor is this a mere question of words: the importance of the whole region of public policy involved makes the actual existence of war at the time of the creation of the contract or its fulfilment necessary. I will assume for my present purpose (though I think it might well be debated) that the Transvaal Company did, to quote the language of Vaughan Williams, L. J., "enter into this contract with a view to the imminent war which might or might not break out with Great Britain."

I note that the Lord Justice uses the phrase "imminent," and one is disposed to ask, Does that word represent a principle capable of logical application to the propositions ultimately arrived at? It is notorious that for many years the Transvaal Government had been purchasing and storing up arms and ammunition to an enormous extent which could have no other object than a war with this country. Were all the contracts made with British subjects illegal? or with foreigners, breaches of neutrality on the part of countries of which such subjects were supplying arms and ammunition to the expected enemy of the British Government? No such principle has ever been affirmed by any lawyer yet, and the principles upon which commercial intercourse must cease between nations at war with each other can only be where the heads of the State have created the state of war. . . .

In order to produce the effect, either nationally or municipally, it must be a war between the two nations. No contract or other transaction with a native of the country which afterwards goes to war is affected by the war. The remedy is indeed suspended: an alien enemy cannot sue in the Courts of either country while the war lasts; but the rights on the contract are unaffected, and when the war is over the remedy in the Courts of either is restored.

The earlier writers on international law used to contend that

some public declaration of war was essential, and Valin, writing in 1770, does not hesitate to describe Admiral Boscawen's operations in the Mediterranean in 1754 as acts of piracy, because no actual declaration of war had been made; but though it cannot be said that that view is now the existing international understanding, it is essential that the hostility must be the act of the nation which makes the war, and no amount of "strained relations" can affect the subjects of either country in their commercial or other transactions: "Quand le conducteur de l'état, le Souverain, déclare la guerre à un autre Souverain on entend que la nation entière déclare la guerre à une autre nation. Car le Souverain représente la nation, et agit au nom de la société entière, et les nations n'ont à faire, les unes aux autres, qu'un corps dans leur qualité de nations. Ces deux nations sont donc ennemis; et tous les sujets de l'une sont ennemis de tous les sujets de l'autre. L'usage est ici conforme aux principes" (Vattel, Droit des Gens, liv. 3, c. 5, § 70).

In Muller v. Thompson, (1811) 2 Camp. 610, 12 R. R. 753, Lord Ellenborough held that the voyage to Königsberg in 1810, though the relations were very strained between this country and Prussia, British ships being actually excluded from Prussia, and it being objected that this was an enemy's port, was lawful inasmuch as no war was declared and no act of hostility committed—we could not be said to be at war, which alone could render the voyage unlawful.

Trading with the King's enemies is, of course, illegal. Undertaking by contract to indemnify the King's enemies against loss inflicted by the King's forces is also illegal. Such things are manifestly unlawful; but the words "King's enemies" are a necessary feature of the last proposition.

Substituting the word "aliens," who may possibly or even probably become the King's enemies—and in this case the loss and the policy were both before there were any persons who could answer to that description—it would be, to my mind, to introduce a new principle into our law to hold that the probability of a war should have the same operation as war itself. It is war and war alone that makes trading illegal.

I think no more striking example of the mischief which might result from so loose a mode of applying the principle of public policy in Courts of justice could be found than the example which elicited Serjeant Marshall's protest, which I have quoted above. Lord Mansfield had expressed the opinion that it was good policy to permit an insurance by British underwriters of ene-

mies' goods, because we might obtain more in premiums than we should lose by capture; but this, in my view, was plainly wrong, and Valin, followed by Pothier and Emergon, denounced such insurance, and said that by the English practice one part of the nation was restoring them by insurance what another part took from them by arms.

If it were competent to a Court of law to consider the question which Vaughan Williams L. J. propounds upon principles of public policy, apart from the known and ascertained rule that intercourse between nations at war is forbidden (which, for the reasons I have given, I think it is not), I should answer the question in a different way from that at which he arrives. Instead of a known and ascertained rule which makes it clear whether a contract is unlawful or not, each of the contending parties to a contract must look all round the political horizon, and form a judgment whether in some one or more contingencies the fulfilment of it may be injurious to his own country in the event of war; and I note here again the word "imminent" finds a place in the learned judge's question. It seems to me that the hindrance done to the free commercial intercourse between nations would be far more injurious to the interests of both than the injury the learned judge suggests. . . .

For these reasons I move your Lordships that this appeal be dismissed and the judgment of the Court of Appeal affirmed with costs.

Lord Davey. . . . My Lords, there are three rules which are established in our common law. The first is that the King's subjects cannot trade with an alien enemy, i. e., a person owing allegiance to a Government at war with the King, without the King's licence. Every contract made in violation of this principle is void, and goods which are the subject of such a contract are liable to confiscation. The second principle is a corollary from the first, but is also rested on distinct grounds of public policy. It is that no action can be maintained against an insurer of an enemy's goods or ships against capture by the British Government. One of the most effectual instruments of war is the crippling of the enemy's commerce, and to permit such an insurance would be to relieve enemies from the loss they incur by the action of British arms, and would, therefore, be detrimental to the interests of the insurer's own country. The principle equally applies where the insurance is made previously to the commencement of hostilities, and was, therefore, legal in its

inception, and whether the person claiming on the policy be a neutral or even a British subject if the insurance be effected on behalf of an alien enemy. The third rule is that, if a loss has taken place before the commencement of hostilities, the right of action on a policy of insurance by which the goods lost were insured is suspended during the continuance of war and revives on the restoration of peace. . . .

[Opinions were also delivered by LORD MACNAGHTEN, LORD BRAMPTON, and LORD LINDLEY.]

NOTE.—It is held in all Anglo-American jurisdictions that the existence of war operates to interrupt all direct relations between the subjects of the two belligerents on the ground that intercourse is inconsistent with a state of war. This is treated as a rule of international law, but it is impossible to reconcile this with the fact that many countries, e. g., Holland, Germany, Austria-Hungary and Italy, permit commercial relations with enemy subjects to continue until expressly forbidden and with the further fact that both Great Britain and the United States mitigate the hardship of the rule of non-intercourse by issuing licenses to trade, and such licenses are not in conflict with any rule of international law. The rule is really one of domestic policy only. Its source was correctly stated by Lord Shaw of Dunfermline in Daimler Co. Lt. v. Continental Tyre and Rubber Co. Ltd., L. R. [1916] 2 A. C. 307, 328:

> War is not war between Sovereigns or Governments alone. It puts each subject of the one belligerent into the position of being the legal enemy of each subject of the other belligerent; and all persons bound in allegiance and loyalty to His Majesty are consequently and immediately, by the force of the common law, forbidden to trade with the enemy Power or its subjects.

Several reasons have been assigned for the enforcement of the rule. In general it is based upon the danger to the state of allowing transactions which can so easily be made the medium of treasonable communications. But in Brandon v. Nesbitt (1794), 6 T. R. 23, the injury that non-intercourse might inflict upon the enemy was first put forward as the reason for the practice, while in Esposito v. Bowden (1857), 7 E. & B. 764, and in Kershaw v. Kelsey (1869), 100 Mass. 561, trade with the enemy was condemned because of its tendency to increase the enemy's resources.

There is a growing opinion in Anglo-American jurisdictions in favor of a relaxation of the rule. So long as a belligerent can forbid its subjects to trade with the enemy when circumstances appear to require such a measure, it would seem that its interests are sufficiently safeguarded, and until affirmative action to the contrary is taken normal relations between individuals should not be interrupted. But the older rule is firmly embodied in judicial decisions, and has been asserted unequivocally by the British Prize Court in the Great War. In The Panariellos (1915) 1 Br. & Col. P. C. 195, 198, Sir Samuel Evans said:

> When war breaks out between States, all commercial intercourse between citizens of the belligerents *ipso facto* becomes illegal, except in so far as it may be expressly allowed or licensed by the head of the State.

An attempt was made to introduce a more liberal rule at the Second Hague Conference by the adoption of section *h* of Article XXIII of Regulations respecting the Laws and Customs of War on Land; but the language of the section is ambiguous and the subject received so little discussion that the Conference can hardly have realized what far-reaching changes the new rule involved.

Among the many cases in which the old rule has been applied these may be noted: Potts v. Bell (1800), 8 T. R. 548 (goods purchased after the outbreak of war in an enemy country but not necessarily from an enemy subject and imported in a neutral ship); The Jonge Pieter (1801), 4 C. Robinson, 79 (trade with the enemy through a neutral port); The Odin (1799), 1 C. Robinson, 248 (fraudulent transfer to a neutral of property engaged in enemy trade); Willison v. Patteson (1817), 7 Taunton, 439 (the rule applied to all contracts made during war and not merely to those of a commercial nature and even though suit be not brought until the close of the war); The Mashona (South Africa, 1900), 17 Buchanan, 135 (cargo in a British vessel consigned by British merchants to neutral merchants domiciled in enemy territory); The Neptunus (1807), 6 C. Robinson, 403; The Panariellos (1915), 1 Br. v. Col. P. C. 195; The Parchim (1915) 1 Ib. 579 (the courts of any of a group of allied states may condemn the goods of a subject of any such states who violate the rule of non-intercourse); The Bernon (1798), 1 C. Robinson, 101; The Ocean (1804), 5 Ib. 90; The Juffrow Catherina (1804), 5 Ib. 141; The Manningtry (1915), 1 Br. v. Col. P. C. 497; The Lutzow (Egypt, 1916), 2 Ib. 122 (a belligerent or neutral subject engaged in trade in the enemy country must withdraw seasonably). In The Rapid (1814), 8 Cranch, 155, the court held that an American who sent an agent to Canada to bring away his property at the outbreak of war with Great Britain was engaged in intercourse with the enemy and his property was condemned. This is unduly rigorous and the case would probably not now be followed. A subject or a neutral who finds himself or his property in enemy territory at the outbreak of war should be given a reasonable opportunity to withdraw without in the meantime exposing himself to the penalty of trading with the enemy, and it was so held in Nigel Gold Mining Co. Lt. v. Hoade, L. R. [1901] 2 K. B. 849. A neutral partner is not obliged to withdraw from transactions with the enemy which were in progress at the outbreak of war provided he does nothing actively to facilitate them. His obligations in this respect are less stringent than those of subjects of a belligerent state, The Anglo-Mexican (1916), L. R. [1916] P. 112.

The rule of non-intercourse is directed not only against commercial relations but against intercourse of any kind. In The Cosmopolite (1801), 4 C. Robinson, 8, 10, Lord Stowell said:

> It is perfectly well known, that by war, all communication between the subjects of the belligerent countries must be suspended, and that no intercourse can legally be carried on between the subjects of the hostile states but by the special license of their respective governments.

In The Rapid (1814), 8 Cranch, 155, 162, the Supreme Court of the United States said:

> If by trading, in prize law, was meant that signification of the term which consists in negotiation or contract, this case would certainly not come under the penalties of the rule. But the object, policy and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent states. Negotiation or contract has, therefore, no necessary connexion with the offence. Intercourse inconsistent with actual hostility, is the offence against which the operation of the rule is directed.

This principle was applied by the Court of Appeal in Robson v. Premier Oil and Pipe Line Co. Lt. (1915), 113 L. T. Rep. 523, in which it was held that enemy shareholders in a British company may not during war vote for directors of the company nor may they delegate their voting rights to a proxy.

For many years the common law courts and the prize courts in Great Britain were in opposition in the views which they held as to whether insurance on enemy property was a permissible transaction. It would seem that contracts of insurance with enemy subjects or for the benefit of enemy subjects are in their nature as objectionable as any other form of contract, but Lord Mansfield, influenced perhaps by his strong bias in favor of the mercantile interests of England, argued that the premiums paid by the enemy and the opportunity which such transactions offered to obtain information from the enemy more than counterbalanced any advantage to the enemy's trade. Hence for about fifty years an owner whose property had been condemned in a British prize court could go into a British common law court and recover its value from a British insurance company. See Henkle v. Royal Exchange Assurance Co. (1749), 1 Vesey, 317; Gist v. Mason (1786), 1 T. R. 84. This continued until 1794 when Lord Mansfield's decisions were overruled and the common law courts placed themselves in harmony with the prize courts. Brandon v. Nesbitt (1794), 1 T. R. 23; Bristow v. Towers (1794) 6 T. R. 35. (The argument of counsel for the plaintiff in the latter case, pages 37-44, includes an account of the practice of the British Government and a full review of the cases.) Six years later the question again came up in the leading case of Potts v. Bell (1800), 8 T. R. 548, when the decisions made in 1794 were affirmed, and since that time the common law courts have consistently followed the admiralty rule.

While the right of a belligerent state to interdict all intercourse with enemy subjects is clear, it may find it advantageous to permit certain forms of commerce. This is done by means of licenses to trade, The Hope (1813), 1 Dodson, 226; Kensington v. Inglis (1807), 8 East, 273; Coppell v. Hall (1869), 7 Wallace, 542. Such a license, even if granted to an alien enemy, implies authority to insure, Usparicha v. Noble (1811), 13 East, 332; and to maintain an action in the courts, United States v. One Hundred Barrels of Cement (1862), 27 Fed. Cases, No. 15945. Licenses are construed liberally in order that the intent of the grantor may be made effective, The Cosmopolite (1801), 4 C. Robinson, 11; The Goede Hoop (1809), Edwards, 327; Flindt v. Scott (1814), 5 Taunton, 674, but

conditions attached to a license must be strictly complied with, Camelo v. Britten (1824), 4 B. & A. 184. A license may be vitiated either by fraud in obtaining it, The Clio (1805), 6 C. Robinson, 67, or by misuse of it, Vandyck v. Whitmore (1801), 1 East, 475.

On the effect of war on intercourse between enemy subjects see Atherley-Jones, *Commerce in War;* Baty and Morgan, *War: Its Conduct and Legal Results,* 294; Bentwich, *War and Private Property;* Bordwell, *The Law of War between Belligerents;* Bonfils (Fauchille), 700; Cobbett, *Cases and Opinions,* II, 62; Page, *War and Alien Enemies,* ch. vi; Moore, *Digest,* VII, 237.

Section 6. The Effect of War on Existing Contracts between Enemy Subjects.

GRISWOLD v. WADDINGTON.

Court of Errors of New York. 1819.
16 Johnson, 438.

Error to the Supreme Court.

[Prior to the War of 1812, Henry Waddington, an American citizen resident in London, and Joshua Waddington, an American citizen resident in New York, were partners in a trading house in London. In the course of the war one of the plaintiffs went to England and entered into commercial relations with Henry Waddington. After the war the plaintiffs brought suit for the balance due on these transactions, and sought to charge Joshua Waddington as a partner of Henry Waddington. The judgment of the trial court in favor of the plaintiffs was reversed by the Supreme Court, and to reverse that decision this writ of error was brought.]

The Chancellor [James Kent]. . . .

[The first part of the opinion is an exhaustive review of all the authorities on the effect of war on commercial relations between subjects of the belligerent states.]

It appears to me, that the declaration of war did, of itself, work a dissolution of all commercial partnerships existing at the time between British subjects and American citizens. By dealing with either party, no third person could acquire a legal right against the other, because one alien enemy cannot, in that capacity, make a private contract binding upon the other. This conclusion would seem to be an inevitable result from the new

relations created by the war. It is a necessary consequence of the other proposition, that it is unlawful to have communication or trade with an enemy. To suppose a commercial partnership (such as this was) to be continued, and recognized by law as subsisting, when the same law had severed the subjects of the two countries, and declared them enemies to each other, is to suppose the law chargeable with inconsistency and absurdity. For what use or purpose could the law uphold such a connection, when all further intercourse, communication, negotiation, or dealing between the partners, was prohibited, as unlawful? Why preserve the skeleton of the firm, when the sense and spirit of it has fled, and when the execution of any one article of it by either, would be a breach of his allegiance to his country? In short, it must be obvious to every one, that a state of war creates disabilities, imposes restraints, and exacts duties altogether inconsistent with the continuance of that relation. Why does war dissolve a charter-party, or a commercial contract for a particular voyage? Because, says Valin, (tom. 1, p. 626,) the war imposes an insurmountable obstacle to the accomplishment of the contract; and this obstacle arising from a cause beyond the control of the party, it is very natural, he observes, that the charter-party should be dissolved, as of course. Why should the contract of partnership continue by law when equally invincible obstacles are created by law to defeat it? If one alien enemy can go and bind his hostile partner, by contracts in time of war, when the other can have no agency, consultation, or control concerning them, the law would be as unjust as it would be extravagant. The good sense of the thing as applicable to this subject, is the rule prescribed by the Roman law, that a copartnership in any business ceased, when there was an end put to the business itself. *Item si adicujus rei societas sit, et finis negotio impositus est, finitur societas.* (Inst. 3, 26, 6).

The doctrine, that war does not interfere with private contracts, is not to be carried to an extent inconsistent with the rights of war. Suppose that H. & J. W. had entered into a contract before the war, which was to continue until 1814, by which one of them was to ship, half yearly, to London, consigned to the other, a cargo of provisions, and the other, in return, to ship to New York a cargo of goods. The war which broke out in 1812, would surely have put an end to the further operation of this contract, lawful and innocent as it was when made. No person could raise a doubt on this point; and what sanctity or magic is there in a contract of copartnership, that it must not yield to the same power?

If we examine, more particularly, the nature and objects of commercial partnerships, it would seem to be contrary to all the rules by which they are to be construed and governed, that they should continue to exist, after the parties are interdicted by the government, from any communication with each other, and are placed in a state of absolute hostility. It is of the essence of the contract that each party should contribute something valuable, as money, or goods, or skill and labour, on joint account, and for the common benefit; and that the object of the partnership should be lawful and honest business. . . . But how can the partners have any unity of interest, or any joint object that is lawful, when their pursuits, in consequence of the war, and in consequence of the separate allegiance which each owes to his own government, must be mutually hostile? The commercial business of each country, and of all its people, is an object of attack, and of destruction to the other. One party may be engaged in privateering, or in supplying the fleets and armies of his country with provisions, or with munitions of war; and can the law recognize the other partner as having a joint interest in the profits of such business? It would be impossible for the one partner to be concerned *in any commercial business,* which was not auxiliary to the resources and efforts of his country in a maritime war. And shall the other partner be lawfully drawing a revenue from such employment of capital, and such personal services directed against his own country? We cannot contemplate such a confusion of obligation between the law of partnership and the law of war, or such a conflict between his interest as a partner, and his duty as a patriot, without a mixture of astonishment and dread. Shall it be said that the partnership must be deemed to be abridged during war, to business that is altogether innoxious and harmless? But I would ask, how can we cut down a partnership in that manner without destroying it? The very object of the partnership, in this case, was, no doubt, commercial business between England and the United States, and which the hostile state of the two countries interdicted; or it may have been business in which the personal communication and advice of each partner was deemed essential, and without which the partnership would not have been formed. It is one of the principles of the law of partnership, that it is dissolved by the death of any one of its members, however numerous the association may be; and the reason is this: the personal qualities of each partner enter into the consideration of the contract, and the survivors ought not to be held bound

without a new assent, when, perhaps, the character of the deceased partner was the inducement to the connection. . . . Shall we say that the partnership continues during war, in a quiescent state, and that the hostile partners do not share in each other's profits, made in carrying on the hostile commerce of each country? It would be then most unjust to make the party who did not share in profit to share in loss, and to be bound by the other's contracts; but if one partner does not share in profit, that alone destroys a partnership. It would be what the Roman lawyers called *Societas leonina,* in allusion to the fable of the lion, who, having entered into a partnership with the other animals of the forest in hunting, appropriated to himself all the prey. (Dig. 17, 2, 29, s. 2. Pothier, Trait. du Cont. de Soc. n. 12.)

It is one of the fundamental principles of every commercial partnership, that each partner has the power to buy and sell, and pay and receive, and to contract and bind the firm. But then, again, as a necessary check to this power, each partner can interfere and stop any contract about to be made by any one of the rest. This is an elementary rule, derived from the civil law. *In re pari potiorem causam esse prohibentis constat.* . . . But if the partnership continues in war between hostile associates, this salutary power is withdrawn, and each partner is left defenceless. If the law continues the connection, after it has destroyed the check, the law is then cruel and unjust.

In speaking of the dissolution of partnerships, the French and civil law writers say, that partnerships are dissolved by a change of the condition of one of the parties which disables him to perform his part of the duty, as by a loss of liberty, or banishment, or bankruptcy, or a judicial prohibition to execute his business, or by confiscation of his goods. . . . The English law of partnership is derived from the same source; and as the cases arise, the same principles are applied. The principle here is, that when one of the parties becomes disabled to act, or when the business of the association becomes impracticable, the law, as well as common reason, adjudges the partnership to be dissolved. . . .

Another objection was raised, from the want of notice of the dissolution of the partnership. The answer to this is extremely easy, and perfectly conclusive. Notice is requisite when a partnership is dissolved by the act of the parties, but it is not necessary when the dissolution takes place, by the act of the law. The declaration of war, from the time it was duly made known to the

nations, put an end to all future dealings between the subjects and citizens of the two countries, and, consequently, to the future operation of the copartnership in question. The declaration of war was, of itself, the most authentic and monitory notice. Any other notice, in a case like this, between two public enemies, who had each his domicil in his own country, would have been useless. All mankind were bound to take notice of the war, and of its consequence. The notice, if given, could only be useless, as his countrymen could not hold any lawful intercourse with the enemy. It could not be given as a joint act, for the partners cannot lawfully commune together.

But, it was said, that the peace had a healing influence, and restored the parties to all their rights, and arrested all confiscations, and forfeitures, which had not previously and duly attached. I do not know that I differ from the counsel in any just application of this doctrine. As far as the war suspended the right of action existing in the adverse party prior to the war, that right revived; but if the contract in this case was unlawful, peace could not revive it, for it never had any legal existence. So too, the copartnership being once dissolved by the war, it was extinguished forever, except as to matters existing prior to the war. . . .

The judgment of the Supreme Court ought to be affirmed.

[Senator Van Vechten delivered a concurring opinion. Senator Livingston and Senator Seymour dissented.]

NOTE.—The effect of the outbreak of war on existing contracts with alien enemies is one of great complexity, for much depends upon the form of the particular contract involved. Furthermore the question is primarily one of municipal rather than of international law and may be differently treated in different countries. It is universally recognized that a state may suspend and in some cases even abrogate contracts made by its subjects with alien enemies. The Anglo-American rule is that executory contracts made with alien enemies before the outbreak of war are suspended but not abrogated, The Juffrow Catherina (1804), 5 C. Robinson, 141; Semmes v. Hartford Insurance Co. (1872), 13 Wallace, 158. But if the contract is one that is by nature incapable of suspension, as a partnership, Griswold v. Waddington (1818), 18 Johnson (N. Y.), 438; or one which involves trade with the enemy, Esposito v. Bowden (1857), 7 E. & B. 763; The Teutonia (1872), L. R. 4 P. C. 171; The William Bagaley (1867), 5 Wallace, 377; or one in which time is of the essence, New York Life Insurance Co. v. Statham (1876), 93 U. S. 24; or one the performance of which is bound to inure to the benefit of the enemy, Furtado v. Rogers (1802), 3 B. & P. 191, the contract is entirely abrogated.

For discussions of the effect of war on the most important kinds of contracts see Esposito v. Bowden (1857), 7 E. & B. 763, Avery v. Bowden (1855), 25 L. J. Q. B. 49, 26 L. J. Q. B. 3 (affreightment); Ward v. Smith

(1869), 7 Wallace, 447, United States v. Grossmayer (1870), 9 Wallace, 72, Washington University v. Finch (1873), 18 Wallace, 106, New York Life Insurance Co. v. Davis (1877), 95 U. S. 425, Williams v. Paine (1898), 169 U. S. 55 (agency); Brandon v. Curling (1803), 4 East, 410, The Jan Frederick (1804), 5 C. Robinson, 128, The Boedes Lust (1804), 5 Ib. 233, Furtado v. Rogers (1802), 3 B. & P. 191, Nigel Gold Mining Co. v. Hoade (1901), 2 K. B. 849 (insurance of goods against capture); W. L. Ingle, Lt., v. Mannheim Insurance Co. (1914), L. R. [1914] 1 K. B. 227 (ordinary marine insurance); Semmes v. Hartford Insurance Co. (1871), 13 Wallace, 158 (fire insurance); New York Life Insurance Co. v. Statham (1876), 93 U. S. 24, New York Life Insurance Co. v. Davis (1877), 95 U. S. 425 (life insurance); Antoine v. Morshead (1815), 6 Taunton, 237 (negotiable instruments); The William Bagaley (1867), 5 Wallace 377, Matthews v. McStea (1875), 91 U. S. 7, Douglas v. United States (1878), 14 Ct. Cl. 1; The Derfflinger (No. 3), (Egypt, 1915), 1 Br. & Col. P. C. 643; The Clan Grant (1915), 1 Ib. 272 (partnership).

In the case of an executed contract made with an alien enemy before the outbreak of war, and the performance is on his side, his remedy is suspended during the continuance of the war, Alcinous v. Nigreu (1854), 4 E. & B. 217; and so also of a debt due and payable to an alien enemy before the outbreak of war, Ex parte Boussmaker (1806), 13 Vesey, 71. But an alien residing in the country by leave of the Crown and probably a domiciled alien without a special license may sue during the war, Wells v. Williams (1697), 1 Salkeld, 45. It has even been held that a resident alien enemy, duly registered as such, may sue on a contract with a native citizen even though he is interned, since the restraint of internment does not in itself affect his status, Schaffhenius v. Goldberg (1915), 113 Law Times, 949.

The exclusion of an enemy claimant from appearance before a prize court in proceedings in which his property rights are being adjudicated seems to be confined to Anglo-American jurisdictions, Nys, *Le Droit International*, III, 150, and has met with much criticism. In The Gutenfels (Egypt, 1915), 1 Br. & Col. P. C. 102, an indignant judge said:

> The fact is that the rule is a bad rule, much more to be honoured in the breach than in the observance; and if we must acknowledge ourselves to be so far fettered by the dead hand of outworn precedent as to recognize its continued existence, I am, at any rate, determined to permit all such breaches of it as my sense of equity and fair dealing towards the enemy may demand.

In the Möwe (1914), L. R. [1915] P. 1, Sir Samuel Evans declared that whether an enemy claimant should be allowed to appear was purely a question of practice, and in ordering that any enemy claimant who conceives that he is entitled to any privilege or relief under any Hague Convention should be allowed to appear and present his claim, his Lordship used these words:

> The practice should conform to sound ideas of what is fair and just. When a sea of passions rises and rages as a natural result of such a calamitous series of wars as the present, it behooves a Court of justice to preserve a calm and equable attitude in all con-

> troversies which come before it for decision, not only where they concern neutrals, but also where they may affect enemy subjects. In times of peace the Admiralty Courts of this realm are appealed to by people of all nationalities who engage in commerce upon the sea, with a confidence that right will be done. So in the unhappy and dire times of war the Court of Prize as a Court of justice will, it is hoped, show that it holds evenly the scales between friend, neutral, and foe.

May a contract between alien enemies be enforced in the courts of a neutral? This question was presented for judicial determination for the first time in Watts, Watts & Co. v. Unione Austriaca di Navigazione (1915), 224 Fed. 188. This was a libel brought by an English company against an Austrian corporation for the price of coal furnished to the respondent's steamers in Algiers prior to the outbreak of war. Jurisdiction was obtained by a writ of foreign attachment on one of the respondent's steamers in American waters. In dismissing the libel, the United States District Court, Veeder, J., said:

> When parties foreign to a state come before its courts asking cognizance of obligations which arose and were to be performed outside that state, the exercise of jurisdiction is not obligatory; it is discretionary, with a view to the circumstances. The Belgenland, 114 U. S. 355; Benedict's *Admiralty*, § 195. If jurisdiction is exercised, it is exercised as an act of international comity; if refused, the refusal does not arise out of any incapacity to act. Comity, therefore, is not a rule of law, but a rule of practice, convenience, and expediency. . . . When this libel was filed Great Britain and Austria-Hungary were at war. . . . The law of nations, as judicially declared, prohibits all intercourse between citizens of the belligerents which is inconsistent with the state of war between their countries. . . . This is the municipal law of England. . . . It is also the law of this country. . . . And in the absence of proof of the foreign law, it may be taken to be the law of Austria-Hungary and of France. It is in fact the law common to all nations, since it is merely a formulation of the instinct of self-defense. . . . Such being the law common to the belligerents and to the neutral forum, it seems clear to me that it should be recognized and applied in this situation. . . . From the standpoint of this neutral jurisdiction the controlling consideration is that the law of both belligerent countries forbids a payment by one belligerent subject to his enemy during the continuance of war. This court, in the exercise of jurisdiction founded on comity, may not ignore that state of war and disregard the consequences resulting from it.

A few weeks later the question arose again in Compagnie Universelle de Telegraphie et de Telephonie Sans Fil v. United States Service Corporation et al. (1915), 84 N. J. Eq. 604. This was a bill brought by a French company against a German company and others to compel specific performance of a contract to convey certain real estate in New Jersey. In sustaining jurisdiction, the New Jersey Court of Chancery, Stevens, V. C., said:

> In times of peace, the courts take jurisdiction, as a matter of course, for the benefit of denizens and aliens alike. If foreign nations are at war among themselves, this nation does not cease to be friendly. Its courts remain open to their subjects. Certainly, a French citizen may still sue an American citizen. Why should he not sue a German subject? No law of France prohibits it. On the contrary, he may sue even in France, if to his advantage and not to the advantage of his enemy. Why may he not sue in this court? If he may not, it can only be on the ground that this court will give *some* effect to German legislation enacted as a war measure—as a means of crippling its enemy. As I have already shown, there is nothing in this legislation, disclosed, at least, by the plea, that prohibits the German subject from defending against a French claim. But suppose there were. If this court gave effect to it, it would in a measure, be enforcing German law, which, on well-settled principles, can have no extra-territorial operation, to the detriment of the French citizen asking to be heard. This, it seems to me, would be an unneutral act.

These two decisions are in plain opposition. The differences in the facts are not sufficient to reconcile them. The New Jersey decision seems the better view. It may be suggested with deference that Judge Veeder's statement that the law of nations "prohibits all intercourse between citizens of the belligerents which is inconsistent with the state of war between their countries" is erroneous. International law goes no farther than to recognize the right of a belligerent to prohibit such intercourse on the part of its subjects. But if a belligerent should declare that the access of enemy subjects to its courts should not be affected by the outbreak of war, it would violate no rule of international law. Much less therefore does a neutral violate the law of nations in refusing to close its courts to suits between aliens merely because a state of war exists between their countries. The correct rule for neutral courts in determining whether they shall exercise jurisdiction is to ignore the existence of war as far as possible and allow it to affect their action only when political controversies or the law of neutrality are involved.

As to the effect of war on contracts see Borchard, sec. 46; Phillipson, *The Effect of War on Contracts;* Leslie Scott, *The Effect of War on Contracts;* Trotter, *The Law of Contract during War,* and *Supplement;* Moore, *Digest,* VII, 250.

PORTER v. FREUDENBERG.

THE COURT OF APPEAL OF GREAT BRITAIN. 1915.
Law Reports [1915] 1 K. B. 857.

[The defendant, a German subject resident in Berlin, maintained a business establishment in London, which was carried on by his agent Barnes on premises leased from the plaintiff. On September 28, 1914, Barnes delivered the keys of the prem-

ises to the plaintiff and the next day removed the whole of the defendant's stock, fixtures and fittings. The plaintiff notified Barnes that the premises would be held at his disposal as agent of the defendant, and then brought suit for a quarter's rent. The trial justice gave leave to issue a concurrent writ, and to serve notice of it upon the defendant at Berlin. As such service was impracticable, the plaintiff appealed and asked for leave for substituted service of notice of the writ upon the defendant's agent in England.]

Lord Reading, C. J. . . . Having now explained the meaning of "alien enemy" for civil purposes, and having decided that such alien enemy's right to sue or proceed either by himself or by any person on his behalf in the King's Courts is suspended during the progress of hostilities and until after peace is restored . . . the next point to consider is whether he is liable to be sued in the King's Courts during the war. To allow an alien enemy to sue or proceed during war in the civil Courts of the King would be, as we have seen, to give to the enemy the advantage of enforcing his rights by the assistance of the King with whom he is at war. But to allow the alien enemy to be sued or proceeded against during war is to permit subjects of the King or alien friends to enforce their rights with the assistance of the King against the enemy. Prima facie there seems no possible reason why our laws should decree an immunity during hostilities to the alien enemy against the payment of just debts or demands due to British or neutral subjects. The rule of the law suspending the alien enemy's right of action is based upon public policy, but no consideration of public policy is apparent which would justify preventing the enforcement by a British or neutral subject of a right against the enemy. As was said by Bailhache, J., in Robinson & Co. v. Continental Insurance Co. of Mannheim (1915), 1 K. B. 155, 159, "To hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule." In our judgment the effect would be to convert that which during war is a disability, imposed upon the alien enemy because of his hostile character, into a relief to him during war from the discharge of his liabilities to British subjects. It is very noteworthy that when dealing with the rights of alien enemies there is no shadow of doubt suggested in the books as to the right to sue alien enemies. More often there is no mention of it, but

sometimes it is the subject of express reference and then always to the same effect, that the alien enemy can be sued during the progress of hostilities. Bacon's *Abridgement,* 7th ed., vol. 1, p. 183, asserts this liability of the alien enemy without doubt or hesitation. "The plea of 'alien enemy' is a bar to a bill for relief in equity as well as to an action at law, but it would seem not sustainable to a mere bill for discovery for as an alien enemy may be sued at law and may have process to compel the appearance of his witnesses so he may have the benefit of a discovery." This is an important passage in other respects also, and in our judgment it is a correct statement of the law. . . .

The Supreme Court of the United States had to consider the position of an alien enemy defendant in McVeigh v. United States (1871), 11 Wallace, 259. The United States, under a statute then in force filed a libel of information in the District Court of Virginia for the forfeiture of certain real and personal property of McVeigh on the ground that he was "a resident of the City of Richmond within the Confederate lines and a rebel." McVeigh appeared by counsel and filed a claim to the property and an answer. The Attorney of the United States moved that the claim and answer and appearance be stricken from the files, and the Court granted the motion and the decree was made for forfeiture of the property. The case eventually was brought to the Supreme Court on writ of error. Swayne J., in delivering the judgment of the court, said: "The order in effect denied the respondent a hearing. It was alleged he was in the position of an alien enemy and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. . . . Whether the legal status of the plaintiff in error was or was not that of an alien enemy is a point not necessary to consider; because, apart from the views we have expressed, conceding the fact to be so, the consequences assumed would by no means follow. Whatever may be the extent of the disability of an alien enemy to sue in the Courts of the hostile country, it is clear that he is liable to be sued, and this carries with it the right to use all the means and appliances of defence." The learned judge relied upon the above mentioned passage in Bacon's *Abridgement* as an authority for this proposition, and the Supreme Court acted upon it by reversing the judgment of the District Court and the Circuit Court. . . .

Once the conclusion is reached that the alien enemy can be

sued, it follows that he can appear and be heard in his defence, and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a Court of justice he must have the right of submitting his answer to the Court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice.

Equally it seems to result that, when sued, if judgment proceeded against him, the appellate Courts are as much open to him as to any other defendant. It is true that he is the person who may be said in one sense to initiate the proceedings in the appellate Court by giving the notice of appeal, which is the first necessary step to being the case before that Court; but he is entitled to have his case decided according to law, and if the judge in one of the King's Courts has erroneously adjudicated upon it he is entitled to have recourse to another and an appellate Court to have the error rectified. Once he is cited to appear he is entitled to the same opportunities of challenging the correctness of the decision of the judge of first instance or other tribunal as any other defendant. The decision in McVeigh v. United States (1871), 11 Wallace, 259, in the Supreme Court of the United States is to the same effect. In that case the defendant, who was appellant in the circumstances already stated, brought writ of error in respect of the judgment of the District and Circuit Courts and succeeded in reversing the judgments of those Courts.

We must now consider whether the same conclusion is reached in reference to appeals by an alien enemy plaintiff, that is, a person who before the outbreak of war was a plaintiff in a suit and then by virtue of his residence or place of business became an alien enemy. As we have seen, he could not proceed with his action during the war. If judgment had been pronounced against him before the war in an action in which he was plaintiff, can he present an appeal to the appellate Courts of the King? We cannot see any distinction in principle between the case of an alien enemy seeking the assistance of the King to enforce a civil right in a Court of first instance and an alien enemy seeking to enforce such right by recourse to the appellate Courts. He is the "actor" throughout. He is not brought to the Court at the suit of another, it is he who invokes their assistance; and it matters not for this purpose that a judgment has been pronounced against him before the war. When once

hostilities have commenced he cannot, so long as they continue, be heard in any suit or proceeding in which he is the person first setting the Courts in motion. If he had given notice of appeal before the war, the hearing of his appeal must be suspended until after the restoration of peace. . . .

NOTE.—In Hastings v. Blake (1596), Noy, 1, it was said:

> Men attaint or outlawed shall be put to answer in any action against them, because it is to their prejudice; But in an action brought by them they shall not be answered, because it is to their benefit.

In accord with the principal case are Hall v. Trussell (1603), Moore, 753; Ramsden v. Macdonald (1748), 1 Wilson, 217; Daubigny v. Davallon (1794), 2 Anstruther, 462; Ex parte Boussmaker (1806), 13 Vesey, 71; Albrecht v. Sussman (1813), 2 V. & B. 323; Barrick v. Buba (1857), 2 C. B. (N. S.), 563; Dorsey v. Kyle, (1869), 30 Maryland, 512; Masterson v. Howard (1873), 18 Wallace, 99; De Jarnette v. De Giverville (1874), 56 Missouri, 440; Ex parte Savage (1914), South Africa L. R. [1914], C. P. D. Part I, 827.

CHAPTER X.

WAR RIGHTS AS TO PRIVATE PROPERTY.

SECTION 1. PRIVATE PROPERTY IN ENEMY TERRITORY.

ARMITZ BROWN v. THE UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1814.
8 Cranch, 110.

[The Emulous, owned by citizens of the United States, was chartered to a British company to carry a cargo from Savannah, Georgia, to Plymouth, England. Having been detained in port by the embargo of April 4, 1812, the vessel proceeded to New Bedford, Massachusetts. War was declared in June, 1812, and some months later the cargo was unloaded, and in November, 1812, part of it was sold to the claimant, who was an American citizen. In April, 1813, the attorney of the United States, apparently on his own motion, seized and libeled that part of the cargo which had been sold to the claimant. The District Court dismissed the libel, but the Circuit Court, Justice Story presiding, reversed the sentence, and the claimant appealed.]

MARSHALL, Ch. J., delivered the opinion of the Court. . . .

The material question made at bar is this. Can the pine timber, even admitting the property not to be changed by the sale in November, be condemned as prize of war?

The cargo of the Emulous having been legally acquired and put on board the vessel, having been detained by an embargo not intended to act on foreign property, the vessel having sailed before the war, from Savannah, under a stipulation to re-land the cargo in some port of the United States, the re-landing having been made with respect to the residue of the cargo, and the pine timber having been floated into shallow water, where it was secured and in the custody of the owner of the ship, an American citizen, the Court cannot perceive any solid distinc-

tion, so far as respects confiscation, between this property and other British property found on land at the commencement of hostilities. It will therefore be considered as a question relating to such property generally, and to be governed by the same rule.

Respecting the power of government no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the Court.

The questions to be decided by the Court are:

1st. May enemy's property, found on land at the commencement of hostilities, be seized and condemned as a necessary consequence of the declaration of war?

2d. Is there any legislative act which authorizes such seizure and condemnation?

Since, in this country, from the structure of our government, proceedings to condemn the property of an enemy found within our territory at the declaration of war, can be sustained only upon the principle that they are instituted in execution of some existing law, we are led to ask,

Is the declaration of war such a law? Does that declaration, by its own operation, so vest the property of the enemy in the government, as to support proceedings for its seizure and confiscation, or does it vest only a right, the assertion of which depends on the will of the sovereign power?

The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but simply confers the right of confiscation.

Between debts contracted under the faith of laws, and property acquired in the course of trade, on the faith of the same laws, reason draws no distinction; and, although, in practice, vessels with their cargoes, found in port at the declaration of war, may have been seized, it is not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace in the course of trade. Such a

proceeding is rare, and would be deemed a harsh exercise of the right of war. But although the practice in this respect may not be uniform, that circumstance does not essentially affect the question. The enquiry is, whether such property vests in the sovereign by the mere declaration of war, or remains subject to a right of confiscation, the exercise of which depends on the national will: and the rule which applies to one case, so far as respects the operation of a declaration of war on the thing itself, must apply to all others over which war gives an equal right. The right of the sovereign to confiscate debts being precisely the same with the right to confiscate other property found in the country, the operation of a declaration of war on debts and other property found in the country must be the same. What then is this operation?

Even Bynkershoek, who maintains the broad principle, that in war everything done against an enemy is lawful; that he may be destroyed, though unarmed and defenceless; that fraud, or even poison, may be employed against him; that a most unlimited right is acquired to his person and property; admits that war does not transfer to the sovereign a debt due to his enemy; and, therefore, if payment of such debt be not exacted, peace revives the former right of the creditor; "because," he says, "the occupation which is had by war consists more in fact that in law." He adds to his observations on this subject, "let it not, however, be supposed that it is only true of actions, that they are not condemned *ipso jure*, for other things also belonging to the enemy, may be concealed and escape condemnation."

Vattel says, that "the sovereign can neither detain the persons nor the property of those subjects of the enemy who are within his dominions at the time of the declaration."

It is true that this rule is, in terms, applied by Vattel to the property of those only who are personally within the territory at the commencement of hostilities; but it applies equally to things in action and to things in possession; and if war did, of itself, without any further exercise of the sovereign will, vest the property of the enemy in the sovereign, his presence could not exempt it from this operation of war. Nor can a reason be perceived for maintaining that the public faith is more entirely pledged for the security of property trusted in the territory of the nation in time of peace, if it be accompanied by its owner, than if it be confided to the care of others.

Chitty, after stating the general right of seizure, says, "But,

in strict justice, that right can take effect only on those possessions of a belligerent which have come to the hands of his adversary after the declaration of hostilities."

The modern rule then would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted stipulating for the right to withdraw such property.

This rule appears to be totally incompatible with the idea, that war does of itself vest the property in the belligerent government. It may be considered as the opinion of all who have written on the *jus belli,* that war gives the right to confiscate, but does not itself confiscate the property of the enemy; and their rules go to the exercise of this right.

The constitution of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity, was received throughout the civilized world. In expounding that constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property, which may enable the government to apply to the enemy the rule that he applies to us. . . .

One view, however, has been taken of this subject which deserves to be further considered.

It is urged that, in executing the laws of war, the executive may seize and the Courts condemn all property which, according to the modern law of nations, is subject to confiscation, although it might require an act of the legislature to justify the condemnation of that property which, according to modern usage, ought not to be confiscated.

This argument must assume for its basis the position that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed. This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

The rule is, in its nature, flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary.

Commercial nations, in the situation of the United States, have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.

It appears to the Court, that the power of confiscating enemy property is in the legislature, and that the legislature has not declared its will to confiscate property which was within our territory at the declaration of war. The Court is therefore of opinion that there is error in the sentence of condemnation pronounced in the Circuit Court in this case, and doth direct that the same be reversed and annulled, and that the sentence of the District Court be affirmed.

[Mr. Justice Story dissented on the ground that the confiscation of enemy property had been authorized by Congress. In his dissenting opinion the learned judge incorporated the opinion which he had rendered in the case in the Circuit Court.]

Note.—Until well toward the end of the eighteenth century, enemy property on land was held to be subject to capture, and the pillaging of places occupied by a hostile force was one of the most brutal incidents of warfare. The case of Ware v. Hylton (1796), 3 Dallas, 199, which involved the validity of a statute of Virginia confiscating debts due to British subjects, indicates the division of opinion which prevailed at that time. Justice Chase said:

> Every nation at war with another is justifiable, by the general and strict law of nations, to seize and confiscate all moveable property of its enemy, of any kind or nature whatsoever, wherever found, whether within its territory or not.

On the other hand, Justice Wilson expressed the view which was finally to prevail when he said:

> By every nation, whatever is its form of government, the confiscation of debts has long been considered disreputable.

While the confiscation of private property on land is now generally reprobated, and is explicitly forbidden by the Hague Convention of 1907 on The Laws and Customs of War on Land, art. 46, the strictness of the rule varies with the kind of property involved. Even in the middle of the

eighteenth century the attempt of Frederick the Great to sequestrate the interest due on a portion of his public debt owned by British subjects was strongly condemned. On this controversy, known as the case of the Silesian Loan, see Moore, *Digest*, VII, 307; Calvo, IV, sec. 1917; Sir Ernest Satow, *The Silesian Loan and Frederick the Great.* As to the power to confiscate private debts see Wolff v. Oxholm (1817), 6 Maule & Selwyn, 92; Hanger v. Abbott (1868), 6 Wallace, 532; Planters' Bank v. Union Bank (1873), 16 Ib. 483; Williams v. Bruffy (1878), 96 U. S. 176; Young v. United States (1878), 97 U. S. 39. In 1861 and 1862 Congress passed two acts by which the confiscation of enemy private property which was being used in aid of the rebellion was authorized. As to their operation see Conrad v. Waples (1878), 96 U. S. 279; Jenkins v. Collard (1892), 145 U. S. 546; United States v. Dunnington (1892), 146 U. S. 338 and cases cited. Property which is of particular service in connection with the war is of course liable to seizure. In the American Civil War cotton was the chief reliance of the Confederacy for the purchase of supplies, and hence was deemed subject to capture, Mrs. Alexander's Cotton (1865), 2 Wallace, 404. For further discussion see Moore, *Digest*, VII, 280-315; Borchard, 255-270 (where the subject is considered from the standpoint of the creation of a claim for remuneration); Cobbett, *Cases and Opinions*, II, 52; Bonfils (Fauchille), 697; Magoon, 264; Latifi, *Effects of War on Property;* Spaight, *War Rights on Land.*

The ancient practice of detaining the ships of countries with which war has broken out or was thought to be impending has fallen into disuse. At the outbreak of the Crimean War in 1854, Great Britain, France and Russia allowed enemy vessels in their ports six weeks in which to depart. See The Phoenix (1854), Spinks, Prize Cases, 1. A similar practice with a varying period of grace was followed by Prussia in 1866, by France and Prussia in 1870 and by Russia and Turkey in 1877. In the Spanish-American War the United States granted a delay of thirty days, which was liberally interpreted in The Buena Ventura (1899), 175 U. S. 384. The spirit if not the letter of the Sixth Convention of the Second Hague Conference was in harmony with the international practice of the preceding half-century. At the opening of the Great War Great Britain allowed enemy merchant ships of less than 6,000 tons ten days in which to load and depart. This was conditioned however upon reciprocity of treatment by Germany. Through a miscarriage of the communications between the two governments they failed to reach an understanding and consequently the British declaration did not become operative. See The Chile (1914), L. R. [1914] P. 212; The Möwe (1914), L. R. [1915] P. 1; The Bellas (Canada, 1914), 1 Br. v. Col. P. C. 95. The practice of the various belligerents at the beginning of the Great War is well summarized by Garner in *Am. Jour. Int. Law*, X. 238.

In the exercise of what is called the right of angary, some states, supported by a few writers, assert that all neutral property within a belligerent's jurisdiction is subject to seizure for purposes of war provided full compensation is made to the owner. In the Franco-Prussian War, Prussia seized certain British steamers lying in the Seine and sunk them for the purpose of obstructing the channel. She also seized the rolling stock of Austrian railways. In neither case could the seizure be said to be due to an overwhelming necessity, which is the justification given by

Phillimore, the authority cited by Prussia. As England and Austria acquiesced in the view of Prussia, those three states must be taken to hold that a high degree of convenience is a sufficient justification for the seizure of neutral property within a belligerent's jurisdiction.

JURAGUA IRON COMPANY, LIMITED, v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1909.
212 U. S. 297.

Appeal from the Court of Claims.

[The plaintiff, a Pennsylvania corporation having its principal office and place of business in Philadelphia, owned mines and other works in Cuba, together with real estate upon which stood 66 buildings used chiefly as dwellings for its employees. In 1898, while the war between the United States and Spain was in progress, the lives of the American troops who were engaged in military operations in the Province of Santiago de Cuba were endangered by the prevalence of yellow fever. As a means of protection General Miles ordered "all places of occupation or habitation which might contain the fever germs" to be destroyed. In accordance with this order, the 66 buildings belonging to the plaintiff were burned and it suffered damage to the amount of $31,166, for the recovery of which this suit was brought. The Court of Claims denied any liability on the part of the United States, and the plaintiff appealed.]

MR. JUSTICE HARLAN delivered the opinion of the court. . . .

It is to be observed at the outset that no fact was found that impeached the good faith, either of General Miles or of his medical staff, when the former, by the advice of the latter, ordered the destruction of the property in question; nor any fact from which it could be inferred that such an order was not necessary in order to guard the troops against the dangers of yellow fever. It is therefore to be assumed that the health, efficiency and safety of the troops required that to be done which was done. Under these circumstances was the United States under any legal obligation to make good the loss sustained by the owner of the property destroyed? . . .

The plaintiff contends that the destruction of the property by order of the military commander representing the authority

and power of the United States was such a taking of private property for public use as to imply a constitutional obligation, on the part of the Government, to make compensation to the owner. Const. Amend. V. In support of that view it refers to United States v. Great Falls Mfg. Co., 112 U. S. 645, 656; Great Falls Mfg. Co. v. Attorney General, 124 U. S. 581, 597-8; United States v. Lynah, 188 U. S. 445. Let us examine those cases. . . .

It is clear that these cases lend no support to the proposition that an implied *contract* arose on the part of the United States to make compensation for the property destroyed by order of General Miles. The cases cited arose in a time of peace and in each it was claimed that there was within the meaning of the Constitution an actual taking of property for the use of the United States, and that the taking was by authority of Congress. That taking, it was adjudged, created by implication an obligation to make the compensation required by the Constitution. But can such a principle be enforced in respect of property destroyed by the United States in the course of military operations for the purpose, and only for the purpose, of protecting the health and lives of its soldiers actually engaged at the time in war in the enemy's country? We say "enemy's country" because, under the recognized rules governing the conduct of a war between two nations, Cuba, being a part of Spain, was enemy's country, and all persons, whatever their nationality, who resided there were, pending such war, to be deemed enemies of the United States and of all its people. The plaintiff, although an American corporation, doing business in Cuba, was, during the war with Spain, to be deemed an enemy to the United States with respect of its property found and then used in that country, and such property could be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war then being prosecuted; indeed, subject under the laws of war to be destroyed whenever, in the conduct of military operations, its destruction was necessary for the safety of our troops or to weaken the power of the enemy.

In Miller v. United States, 11 Wall. 268, 305, the court, speaking of the powers possessed by a nation at war, said: "It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now, what is the right, and why is it allowed? It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated prop-

erty, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property. In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality." In Lamar's Ex'r v. Browne, 92 U. S. 187, 194, the court said: "For the purposes of capture, property found in enemy territory is enemy property, without regard to the status of the owner. In war, all residents of enemy country are enemies." "All property within enemy territory," said the court in Young v. United States, 97 U. S. 39, 60, "is in law enemy property, just as all persons in the same territory are enemies. A neutral owning property within the enemy's lines holds it as enemy property, subject to the laws of war; and if it be hostile property, subject to capture." Referring to the rules of war between independent nations as recognized on both sides in the late Civil War, the court, in United States v. Pacific Railroad Co., 120 U. S. 227, 233, 239, said: "The rules of war, as recognized by the public law of civilized nations, became applicable to the contending forces. . . . The inhabitants of the Confederates States on the one hand and of the States which adhered to the Union on the other became enemies, and subject to be treated as such, without regard to their individual opinions or dispositions; while during its continuance commercial intercourse between them was forbidden, contracts between them were suspended, and the courts of each were closed to the citizens of the other. Brown v. Hiatts, 14 Wall. 177, 184. . . . More than a million of men were in the armies on each side. The injury and destruction of private property caused by their operations, and by measures necessary for their safety and efficiency, were almost beyond calculation. For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the Government. By the well-settled doctrines of public law it was not responsible for them. . . . The principle that, for injuries to or destruction of private property in necessary military operations, during the civil war, the Government is not responsible, is thus considered established. Compensation has been made in several

such cases, it is true; but it has generally been, as stated by the President in his veto message, 'a matter of bounty rather than of strict legal right.'" See also The Venus, 8 Cranch, 253, 278; The Venice, 2 Wall. 258, 275; The Cheshire, 3 Wall. 231, 233; The Gray Jacket, 5 Wall. 342, 345, 369; The Friendschaft, 4 Wheat. 105, 107; Griswold v. Waddington, 16 Johns. 438, 446-7; Vattel, b. 3, c. 5, Sec. 70, and c. 4, Sec. 8; Burlamaqui, Pt. 4, c. 4, Sec. 20.

So in Hall's International Law, 5th ed., 500, 504, 533: "A person though not a resident in a country may be so associated with it through having or being a partner in a house of trade as to be affected by its enemy character, in respect at least of the property which he possesses in the belligerent territory." In Whiting's War Powers Under the Constitution, 340, 342, the author says: "A foreigner may have his personal or permanent domicile in one country, and at the same time his constructive or mercantile domicile in another. The national character of a merchant, so far as relates to his property engaged in trade, is determined by his commercial domicile. 'All such persons . . . are *de facto* subjects of the enemy sovereign, being residents within his territory, and are adhering to the enemy so long as they remain within his territory.' . . . A neutral, or a citizen of the United States, domiciled in the enemy's country, not only in respect to his property, but also as to his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation."

In view of these principles—if there were no other reason—the plaintiff corporation could not invoke the protection of the Constitution in respect of its property used in business in Cuba, during the war, any more than a Spaniard residing there could have done, under like circumstances, in reference to his property then in that island. If the property destroyed by order of General Miles had belonged at the time to a resident Cuban, the owner would not have been heard in any court, under the facts found, to claim, as upon implied contract, compensation from the United States on account of such destruction. How then under the facts found could an obligation, based on implied contract, arise under the Constitution in favor of the plaintiff, an American corporation, which at the time and in reference to the property in question had a commercial domicile in the enemy's country? It is true that the army, under General Miles, was under a duty to observe the rules

governing the conduct of independent nations when engaged in war—a duty for the proper performance of which the United States may have been responsible in its political capacity to the enemy government. If what was done was in conformity to those rules—as upon the facts found we must assume that it was—then the owner of the property has no claim of any kind for compensation or damages; for, in such a case the Commanding General has as much right to destroy the property in question if the health and safety of his troops required that to be done, as he would have had if at the time the property had been occupied and was being used by the armed troops of the enemy for hostile purposes. . . . The judgment of the Court of Claims must be affirmed. *It is so ordered.*

NOTE.—In general a military force in occupation of a conquered country may seize for its own use any private property therein which it deems necessary or convenient, and the validity of such seizures cannot be questioned in the municipal tribunals of the district where they occur, Elphinstone v. Bedreechund (1817), 1 Knapp, P. C. 316; Dow v. Johnson (1879), 100 U. S. 158, 167. In the case of the destruction of private property on the ground of military necessity, the degree of the necessity does not present a justiciable question, Ex parte Marais, L. R. [1902] A. C. 109. See also Mitchell v. Harmony (1852), 13 Howard, 115; The Prize Cases (1863), 2 Black, 635; The William Bagaley (1867), 5 Wallace, 377; Miller v. United States (1871), 11 Ib. 268; United States v. Farragut (1875), 22 Ib. 406; Hijo v. United States (1904), 194 U. S. 315; Grant v. United States (1863), 1 Ct. Cl. 41; Wiggins v. United States (1868), 3 Ib. 412; Green v. United States (1875), 10 Ib. 466; Gooch v. United States (1880), 15 Ib. 281; Heflebower v. United States (1886), 21 Ib. 228; Brandon v. United States (1911), 46 Ib. 559. See also Moore, *Digest*, VI, 833; Borchard, sec. 103.

SECTION 2. THE RIGHT OF VISIT, SEARCH AND CAPTURE ON THE HIGH SEAS.

THE MARIA.

HIGH COURT OF ADMIRALTY OF GREAT BRITAIN. 1799.
1 C. Robinson, 340.

This was the leading case of a fleet of Swedish merchantmen, carrying pitch, tar, hemp, deals, and iron to several ports of France, Portugal, and the Mediterranean; and taken, Jan. 1798, sailing under convoy of a ship of war, and proceeded against for resistance of visitation and search by British cruisers. . . .

Sir W. Scott [Lord Stowell]: . . . I trust that it has not escaped my anxious recollection for one moment what it is that the duty of my station calls for from me;—namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without distinction to independent states, some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations: but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm;—to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. . . . [Here follows an examination of the facts of the capture and the instructions to the Swedish cruisers.]

Removing mere civility of expression, what is the real import of these instructions? Neither more nor less than this, according to my apprehension:—"If you meet with the cruisers of the belligerent states, and they express an intention of visiting and searching the merchant-ships, you are to *talk* them out of their purpose if you can; and if you can't, you are to *fight* them out of it." That is the plain English, and, I presume, the plain Swedish, of the matter. . . .

This being the actual state of facts, it is proper for me to examine, 2dly, what is their legal state, or, in other words, to what considerations they are justly subject, according to the law of nations; for which purpose I state a few principles of that system of law which I take to be incontrovertible.

1st, That the right of visiting and searching merchant-ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destinations what they may, because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not

at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule, that *free ships make free goods,* must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledged it, without the exception even of Hubner himself, the great champion of neutral privileges. In short, no man in the least degree conversant in subjects of this kind has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force—something in the nature of civil process, where force is employed, but a lawful force, which cannot lawfully be resisted. For it is a wild conceit that wherever force is used, it may be forcibly resisted; a lawful force cannot lawfully be resisted. The only case where it can be so in matters of this nature, is in the state of war and conflict between two countries, where one party has a perfect right to attack by force, and the other has an equally perfect right to repel by force. But in the relative situation of two countries at peace with each other, no such conflicting rights can possibly coexist.

2dly, That the authority of the Sovereign of the neutral country being interposed in any manner of mere force cannot *legally* vary the rights of a lawfully-commissioned belligerent cruiser; I say *legally,* because what may be given, or be fit to be given, in the administration of this species of law, to considerations of comity or of national policy, are views of the matter which, sitting in this Court, I have no right to entertain. All that I assert is, that *legally* it cannot be maintained, that if a Swedish commissioned cruiser, during the wars of his own country, has a right by the law of nations to visit and examine neutral ships, the King of England, being neutral to Sweden, is authorized by that law to obstruct the exercise of that right with respect to the merchant-ships of his country. I add this, that I cannot but think that if he obstructed it by force, it would very much resemble (with all due reverence be it spoken) an opposition of illegal violence to legal right. Two sovereigns

may unquestionably agree, if they think fit, (as in some late instances they have agreed,) by special covenant, that the presence of one of their armed ships along with their merchant-ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant-ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it any more than with any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independent of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it. I am not ignorant, that amongst the loose doctrines which modern fancy, under the various denominations of philosophy and philanthropy, and I know not what, have thrown upon the world, it has been within these few years advanced, or rather insinuated, that it might possibly be well if such a security were accepted. Upon such unauthorized speculations it is not necessary for me to descant: the law and practice of nations (I include particularly the practice of Sweden when it happens to be belligerent) give them no sort of countenance; and until that law and practice are new-modelled in such a way as may surrender the known and ancient rights of some nations to the present convenience of other nations, (which nations may perhaps REMEMBER to *forget* them, when they happen to be themselves belligerent,) no reverence is due to them; they are the elements of that system which, if it is consistent, has for its purpose an entire abolition of capture in war—that is, in other words, to change the nature of hostility, as it has ever existed amongst mankind, and to introduce a state of things not yet seen in the world, that of a military war and a commercial peace. If it were fit that such a state should be introduced, it is at least necessary that it should be introduced in an avowed and intelligible manner, and not in a way which, professing gravely to adhere to that system which has for centuries prevailed among civilized states, and urging at the same time a pretension utterly inconsistent with all its known principles, delivers over the whole matter at once to eternal controversy and conflict, at the expense of the constant hazard of the harmony of states, and of the lives and safeties of innocent individuals.

3dly, That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visita-

tion and search. For the proof of this I need only refer to Vattel, one of the most correct and certainly not the least indulgent of modern professors of public law. In Book III. c. vii., sect. 114, he expresses himself thus: "On ne peut empecher le transport des effets de contrebande, si l'on ne visite pas les vaisseaux neutres que l'on rencontre en mer. On est donc en droit de les visiter. Quelques nations puissantes ont refusé en différents tems de se soumettre à cette visite, aujourd'hui un vaisseau neutre, qui refuseroit de souffrir la visite, se seroit condamner par cela seul, comme etant de bonne prise." Vattel is here to be considered not as a lawyer merely delivering an opinion, but as a witness asserting the fact—the fact that such is the existing practice of modern Europe. And to be sure the only marvel in the case is, that he should mention it as a law merely modern, when it is remembered that it is a principle, not only of the civil law, (on which great part of the law of nations is founded,) but of the private jurisprudence of most countries in Europe,—that a contumacious refusal to submit to fair inquiry infers all the penalties of convicted guilt. . . . I venture to lay it down that by the law of nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel to a lawful cruiser, is followed by the legal consequence of confiscation. . . .

THE SALLY.

The Lords Commissioners of Appeals of Great Britain. 1795.
3 C. Robinson, 300, *note.*

The Sally, Griffiths, was a case of a cargo of corn shipped March 1793 by Steward and Plunket of Baltimore, ostensibly for the account and risk of Conyngham, Nesbit, and Co. of Philadelphia, and consigned to them *or their assigns:*—By an endorsement on the bill of lading, it was further agreed that the ship should proceed to Havre de Grace, and there wait such time as might be necessary, the orders of the consignee of the said cargo (the mayor of Havre), either to deliver the same at the port of Havre, or proceed therewith to any one port without the Mediterranean. . . .

Amongst the papers was a concealed letter from Jean Ternant, the minister of the French Republic to the United States, in which he informs the minister of foreign affairs in France,

"The house of Conyngham and Co. already known to the ministers, by their former operations for France, is charged by me to procure without delay, a consignment of 22,000 bushels of wheat, 8,000 barrels of fine flour, 900 barrels of salted beef from New England. The conditions stipulated are the same as those of the contract of 2d November 1792 with the American citizens Swan and Co. . . . It has been moreover agreed, considering the actual reports of war, that the whole shall be sent as American property to Havre and to Nantes, with power to our government of sending the ships to other ports conditional on the usual freight. As you have not signified to me to whom these cargoes ought to be delivered in our ports, I shall provide each captain with a letter to the mayor of the place."

There was also a letter from J. Ternant to the mayor of the municipality of Havre. "Our government having ordered me to send supplies of provisions to your port, I inform you that the bearer of this, commanding the American ship the Sally, is laden with a cargo of wheat, of which he will deliver you the bill of lading."

To the 12th and 20th interrogatories the master deposed, "that he believes the flour was the property of the French government, and, on being unladen, would have immediately become the property of the French government." . . .

THE COURT [present the Earl of Mansfield, Sir R. P. Arden, M. R., and Sir W. Wynne] said: It has always been the rule of the prize Courts, that property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is to be considered as enemies' property. When the contract is made in time of peace or without any contemplation of a war, no such rule exists:—But in a case like the present, where the form of the contract was framed directly for the purpose of obviating the danger apprehended from approaching hostilities, it is a rule which unavoidably must take place. The bill of lading expresses account and risk of the American merchants; but papers alone make no proof, unless supported by the depositions of the master. Instead of supporting the contents of his papers, the master deposes, "that on arrival the goods would become the property of the French government," and all the concealed papers strongly support him in this testimony: The *evidentia rei* is too strong to admit farther proof. Supposing that it was to become the property of the enemy on delivery,

capture is considered as *delivery:* The captors, by the rights of war, stand in the place of the enemy, and are entitled to a condemnation of goods passing under such a contract, as of enemy's property. On every principle on which Prize Courts can proceed, this cargo must be considered as enemy's property.

Condemned.

THE PACKET DE BILBOA.

HIGH COURT OF ADMIRALTY OF GREAT BRITAIN. 1799.
2 C. Robinson, 133.

This was a case of a claim of an English house, for goods shipped on board a Spanish vessel, by the order of Spanish merchants, before hostilities with Spain, and captured December 1796, on a voyage from London to Corunna. . . .

Sir W. SCOTT [LORD STOWELL]. This is a claim of a peculiar nature for goods sent by British subjects to Spain, shipped before hostilities, during the time of that situation of the two countries, of which it was unknown, even to our government, what would be the issue, between them. There appears to be no ground to say, that this contract was influenced by speculations on the prospect of a war, or that anything has been specially done to avoid the risks of war. It is shown in the affidavit of the claimant, "That this is the constant habit and practice of this trade;" whether it is the practice of the Spanish trade generally, or only the particular mode of these individuals in carrying on commerce together is not material, as the latter would be quite sufficient to raise the subject of this claim. The question is, In whom is the legal title? Because, if I should find that the interest was in the Spanish consignee, I must then condemn, and leave the British party to apply to the Crown for that grace and favor which it is always ready to shew; the property being condemnable to the Crown as taken before hostilities.

The statement of the claim sets forth, that these goods have not been paid for by the Spaniard;—that would go but little way,—that alone would not do; there must be many cases in which British merchants suffer from capture, by our own cruisers, of goods shipped for foreign account before the breaking out of hostilities. It goes on to state, "That, according to the custom of the trade, a credit of six, nine, or twelve months

is usually given, and that it is not the custom to draw on the consignee till the arrival of the goods; that the sea risk in peace as well as war is on the consignor, that he insures, and has no remedy against the consignee for any accident that happens during the voyage." Under these circumstances, in whom does the property reside? The ordinary state of commerce is, that goods ordered and delivered to the master are considered as delivered to the consignee, whose agent the master is in this respect; but that general contract of the law may be varied by special agreement, or by a particular prevailing practice, that presupposes an agreement amongst such a description of merchants. In time of profound peace when there is no prospect of approaching war, there would unquestionably be nothing illegal in contracting, that the whole risk should fall on the consignor, till the goods came into possession of the consignee. In time of peace they may divide their risk as they please, and nobody has a right to say they shall not; it would not be at all illegal, that goods not shipped in time of war, or in contemplation of war, should be at the risk of the shipper. In time of war this cannot be permitted, for it would at once put an end to all captures at sea; the risk would in all cases be laid on the consignor, where it suited the purpose of protection; on every contemplation of a war, this contrivance would be practiced in all consignments from neutral ports to the enemy's country, to the manifest defrauding of all rights of capture; it is therefore considered to be an invalid contract in time of war; or, to express it more accurately it is a contract which, if made in war, has this effect; that the captor has a right to seize it and convert the property to his own use; for he having all the rights that belong to his enemy, is authorized to have his taking possession considered as equivalent to an actual delivery to his enemy; and the shipper who put it on board during a time of war, must be presumed to know the rule, and to secure himself in his agreement with the consignee, against the contingence of any loss to himself that can arise from capture. In other words, he is a mere insurer against sea risk, and he has nothing to do with the case of capture, the loss of which falls entirely on the consignee. If the consignee refuses payment, and throws it upon the shipper, the shipper must be supposed to have guarded his own interests against that hazard, or he has acted improvidently and without caution.

The present contract is not of this sort; it stands as a lawful agreement, being made whilst there was neither war nor pros-

pect of war. The goods are sent at the risk of the shipper: If they had been lost, on whom would the loss have fallen but on him? What surer test of property can there be than this? It it the true criterion of property, that, if you are the person on whom the loss will fall, you are to be considered as the proprietor. The bill of lading very much favors this account. The master binds himself to the shipper, "to deliver for you and in your name," by which it is to be understood that the delivery had not been made to the master for the consignee, but that he was to make the delivery in the name of the shipper to the consignee, till which time the inference is, that they were to remain the property of the shipper: as to the payment of freight, that is not material, as in the end the purchaser must necessarily pay the carriage:—The other consideration, Who bears the loss? much outweighs that,—neither does the case put shew the contrary. The case put is—supposing Spain and England both neutral, and that these goods had been taken by the French and sold to great profit, to whose advantage would it have been? The answer is, If the goods were to continue the property of the shipper till delivery, it must have enured to *his* benefit, and not that of the consignee. To make the loss fall upon the shipper in the case of the present shipment, would be harsh in the extreme. He ships his goods in the ordinary course of traffic, by an agreement mutually understood between the parties, and in no wise injurious to the rights of any third party; an event subsequently happens which he could in no degree provide against. If he is to be the sufferer he is a sufferer without notice, and without the means of securing himself; he was not called upon to know that the injustice of the other party would produce a war before the delivery of his goods: The consignee may refuse payment, referring to the terms of the contract which was made when it was perfectly lawful; and under what circumstances and on what principles the shipper could ever enforce payment against the consignee is not easy to discover. The goods have never been delivered in Spain; they were to have been at the risk of the shipper till delivery, and this under a perfectly fair contract. I must consider the property to reside still in the English merchant; it is a case altogether different from other cases which have happened on this subject *flagrante bello*. I am of opinion that, on all just considerations of ownership, the legal property is in the British merchant, that the loss must have fallen on the shipper, and the delivery was not to have been made till the last

stage of the business, till they had actually arrived in Spain, and had been put into the hands of the consignee; and therefore I shall decree restitution of the goods to the shipper.

On prayer that the captor's expenses might be paid, it was answered that they had already had the benefit of the condemnation of the ship.

Court.—I think there has been a great service performed to the shipper. If the goods had not been captured, they would have gone into the possession of the enemy. The captor did right in bringing the question before the Court, and he ought by no means to be a loser.—I shall not give a salvage, but shall direct the expenses of the captor to be paid out of the proceeds.

THE NEREIDE.

SUPREME COURT OF THE UNITED STATES. 1815.
9 Cranch, 388.

Appeal from the Circuit Court of the United States for the district of New York.

[The ship Nereide, the property of a British subject, was chartered in London August 26, 1813, by Manuel Pinto, a Spanish citizen residing in Buenos Ayres, for a voyage from London to Buenos Ayres and return. The ship was loaded with a cargo belonging in part to British and in part to Spanish subjects. On her outward voyage, while in the vicinity of Madeira, the ship was captured by an American privateer, and brought into the port of New York, where the vessel and cargo were libelled and condemned. Pinto, on behalf of himself and other Spanish subjects, appealed from that part of the decision which applied to so much of the cargo as was their property.]

MARSHALL, CH. J., . . . delivered the opinion of the court. . . .

2. Does the treaty between Spain and the United States subject the goods of either party, being neutral, to condemnation as enemy property, if found by the other in the vessel of an enemy? That treaty stipulates that neutral bottoms shall make neutral goods, but contains no stipulation that enemy bottoms shall communicate the hostile character to the cargo. It is contended by the captors that the two principles are so completely identified that the stipulation of the one necessarily includes the other.

Let this proposition be examined.

The rule that the goods of an enemy found in the vessel of a friend are prize of war, and that the goods of a friend found in the vessel of an enemy are to be restored, is believed to be a part of the original law of nations, as generally, perhaps universally, acknowledged. Certainly it has been fully and unequivocally recognized by the United States. This rule is founded on the simple and intelligible principle that war gives a full right to capture the goods of an enemy, but gives no right to capture the goods of a friend. In the practical application of this principle, so as to form the rule, the propositions that the neutral flag constitutes no protection to enemy property, and that the belligerent flag communicates no hostile character to neutral property, are necessarily admitted. The character of the property, taken distinctly and separately from all other considerations, depends in no degree upon the character of the vehicle in which it is found.

Many nations have believed it to be their interest to vary this simple and natural principle of public law. They have changed it by convention between themselves as far as they have believed it to be for their advantage to change it. But unless there be something in the nature of the rule which renders its parts unsusceptible of division, nations must be capable of dividing it by express compact, and if they stipulate either that the neutral flag shall cover enemy goods, or that the enemy flag shall infect friendly goods, there would, in reason, seem to be no necessity for implying a distinct stipulation not expressed by the parties. Treaties are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations and cannot be supposed either to omit or insert an article, common in public treaties, without being aware of the effect of such omission or insertion. Neither the one nor the other is to be ascribed to inattention. And if an omitted article be not necessarily implied in one which is inserted, the subject to which that article would apply remains under the ancient rule. That the stipulation of immunity to enemy goods in the bottoms of one of the parties being neutral does not imply a surrender of the goods of that party being neutral, if found in the vessel of an enemy, is the proposition of the counsel for the claimant, and he powerfully sustains that proposition by arguments arising from the nature of the two stipulations. The agreement that neutral bottoms shall make neutral goods is, he very justly remarks, a concession made by the belligerent to

the neutral. It enlarges the sphere of neutral commerce, and gives to the neutral flag a capacity not given to it by the law of nations.

The stipulation which subjects neutral property, found in the bottom of an enemy, to condemnation as prize of war, is a concession made by the neutral to the belligerent. It narrows the sphere of neutral commerce, and takes from the neutral a privilege he possessed under the law of nations. The one may be, and often is, exchanged for the other. But it may be the interest and the will of both parties to stipulate the one without the other; and if it be their interest, or their will, what shall prevent its accomplishment? A neutral may give some other compensation for the privilege of transporting enemy goods in safety, or both parties may find an interest in stipulating for this privilege, and neither may be disposed to make to, or require from, the other the surrender of any right as its consideration. What shall restrain independent nations from making such a compact? And how is their intention to be communicated to each other or to the world so properly as by the compact itself?

If reason can furnish no evidence of the indissolubility of the two maxims, the supporters of that proposition will certainly derive no aid from the history of their progress from the first attempts at their introduction to the present moment.

For a considerable length of time they were the companions of each other—not as one maxim consisting of a single indivisible principle, but as two stipulations, the one, in the view of the parties, forming a natural and obvious consideration for the other. The celebrated compact termed the armed neutrality attempted to effect by force a great revolution in the law of nations. The attempt failed, but it made a deep and lasting impression on public sentiment. The character of this effort has been accurately stated by the counsel for the Claimants. Its object was to enlarge, and not in any thing to diminish the rights of neutrals. The great powers, parties to this agreement, contended for the principle, that free ships should make free goods; but not for the converse maxim; so far were they from supposing the one to follow as a corollary from the other, that the contrary opinion was openly and distinctly avowed. The king of Prussia declared his expectation that in future neutral bottoms would protect the goods of an enemy, and that neutral goods would be safe in an enemy bottom. There is no reason to believe that this opinion was not common

to those powers who acceded to the principles of the armed neutrality.

From that epoch to the present, in the various treaties which have been formed, some contain no article on the subject and consequently leave the ancient rule in full force. Some stipulate that the character of the cargo shall depend upon the flag, some that the neutral flag shall protect the goods of an enemy, some that the goods of a neutral in the vessel of a friend shall be prize of war, and some that the goods of an enemy in a neutral bottom shall be safe, and that friendly goods in the bottom of an enemy shall also be safe.

This review which was taken with minute accuracy at the bar, certainly demonstrates that in public opinion no two principles are more distinct and independent of each other than the two which have been contended to be inseparable.

Do the United States understand this subject differently from other nations? It is certainly not from our treaties that this opinion can be sustained. The United States have in some treaties stipulated for both principles, in some for one of them only, in some that neutral bottoms shall make neutral goods and that friendly goods shall be safe in the bottom of an enemy. It is therefore clearly understood in the United States, so far as an opinion can be formed on their treaties, that the one principle is totally independent of the other. They have stipulated expressly for their separation, and they have sometimes stipulated for the one without the other.

But in a correspondence between the secretary of state of the United States and the minister of the French republic in 1793, Prussia is enumerated among those nations with whom the United States had made a treaty adopting the entire principle that the character of the cargo shall be determined by the character of the flag.

Not being in possession of this correspondence the Court is unable to examine the construction it has received. It has not deferred this opinion on that account, because the point in controversy at that time was the obligation imposed on the United States to protect belligerent property in their vessels, not the liability of their property to capture if found in the vessel of a belligerent. To this point the whole attention of the writer was directed, and it is not wonderful that in mentioning incidentally the treaty with Prussia which contains the principle that free bottoms made free goods, it should have escaped his recollection that it did not contain the converse

of the maxim. On the talents and virtues which adorned the cabinet of that day, on the patient fortitude with which it resisted the intemperate violence with which it was assailed, on the firmness with which it maintained those principles which its sense of duty prescribed, on the wisdom of the rules it adopted, no panegyric has been pronounced at the bar in which the best judgment of this Court does not concur. But this respectful deference may well comport with the opinion, that an argument incidentally brought forward by way of illustration, is not such full authority as a decision directly on the point might have been.

3. The third point made by the captors is, that whatever construction might be put on our treaty with Spain, considered as an independent measure, the ordinances of that government would subject American property, under similar circumstances, to confiscation, and therefore the property, claimed by Spanish subjects in this case, ought to be condemned as prize of war.

The ordinances themselves have not been produced, nor has the Court received such information respecting them as would enable it to decide certainly either on their permanent existence, or on their application to the United States. But be this as it may, the Court is decidedly of opinion that reciprocating to the subjects of a nation, or retaliating on them, its injust proceedings towards our citizens, is a political not a legal measure. It is for the consideration of the government not of its Courts. . . . If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land.

Thus far the opinion of the Court has been formed without much difficulty. Although the principles, asserted by the counsel, have been sustained on both sides with great strength of argument, they have been found on examination to be simple and clear in themselves. Stripped of the imposing garb in which they have been presented to the Court, they have no intrinsic intricacy which should perplex the understanding.

The remaining point, is of a different character. Belligerent rights and neutral privileges are set in array against each other. Their respective pretensions, if not actually intermixed, come into close contact, and the line of partition is not so distinctly marked as to be clearly discernible. It is impossible to declare

in favor of either, without hearing, from the other, objections which it is difficult to answer and arguments, which it is not easy to refute. The Court has given to this subject a patient investigation, and has endeavored to avail itself of all the aid which has been furnished by the bar. The result, if not completely satisfactory even to ourselves, is one from which it is believed we should not depart were further time allowed for deliberation.

4. Has the conduct of Manuel Pinto and of the Nereide been such as to impress the hostile character on that part of the cargo which was in fact neutral?

In considering this question the Court has examined separately the parts which compose it.

The vessel was armed, was the property of an enemy, and made resistance. How do these facts affect the claim?

Had the vessel been armed by Pinto, that fact would certainly have constituted an important feature in the case. But the Court can perceive no reason for believing she was armed by him. He chartered, it is true, the whole vessel, and that he might as rightfully do as contract for her partially; but there is no reason to believe that he was instrumental in arming her. . . .

Whether the resistance, which was actually made, is in any degree imputable to Mr. Pinto, is a question of still more importance.

It has been argued that he had the whole ship, and that, therefore, the resistance was his resistance. . . . His control over the ship began and ended with putting the cargo on board. He does not appear ever to have exercised any authority in the management of the ship. So far from exercising any during the battle, he went into the cabin where he remained till the conflict was over. . . .

The next point to be considered is the right of a neutral to place his goods on board an armed belligerent merchantman.

That a neutral may lawfully put his goods on board a belligerent ship for conveyance on the ocean, is universally recognized as the original rule of the law of nations. It is, as has already been stated, founded on the plain and simple principle that the property of a friend remains his property wherever it may be found. "Since it is not," says Vattel, "the place where a thing is which determines the nature of that thing, but the character of the person to whom it belongs, things belonging to neutral persons which happen to be in an enemy's country, or on board

an enemy's ships, are to be distinguished from those which belong to the enemy."

Bynkershoek lays down the same principles in terms equally explicit; and in terms entitled to the more consideration, because he enters into the enquiry whether a knowledge of the hostile character of the vessel can effect the owner of the goods.

The same principle is laid down by other writers on the same subject, and is believed to be contradicted by none. It is true there were some old ordinances of France declaring that a hostile vessel or cargo should expose both to condemnation. But these ordinances have never constituted a rule of public law.

It is deemed of much importance that the rule is universally laid down in terms which comprehend an armed as well as an unarmed vessel; and that armed vessels have never been excepted from it. Bynkershoek, in discussing a question suggesting an exception, with his mind directed to hostilities, does not hint that this privilege is confined to unarmed merchantmen.

In point of fact, it is believed that a belligerent merchant vessel rarely sails unarmed, so that this exception from the rule would be greater than the rule itself. At all events, the number of those who are armed and who sail under convoy, is too great not to have attracted the attention of writers on public law; and this exception to their broad general rule, if it existed, would certainly be found in some of their works. It would be strange if a rule laid down, with a view to war, in such broad terms as to have universal application, should be so construed as to exclude from its operation almost every case for which it purports to provide, and yet that not a *dictum* should be found in the books pointing to such construction.

The antiquity of the rule is certainly not unworthy of consideration. It is to be traced back to the time when almost every merchantman was in a condition of self-defence, and the implements of war were so light and so cheap that scarcely any would sail without them.

A belligerent has a perfect right to arm in his own defence; and a neutral has a perfect right to transport his goods in a belligerent vessel. These rights do not interfere with each other. The neutral has no control over the belligerent right to arm — ought he to be accountable for the exercise of it?

By placing neutral property in a belligerent ship, that property, according to the positive rules of law, does not cease to be neutral. Why should it be changed by the exercise of a belligerent right, universally acknowledged and in common use when

the rule was laid down, and over which the neutral had no control?

The belligerent answers, that by arming his rights are impaired. By placing his goods under the guns of an enemy, the neutral has taken part with the enemy and assumed the hostile character.

Previous to that examination which the Court has been able to make of the reasoning by which this proposition is sustained, one remark will be made which applies to a great part of it. The argument which, taken in its fair sense, would prove that it is unlawful to deposit goods for transportation in the vessel of an enemy generally, however imposing its form, must be unsound, because it is in contradiction to acknowledged law.

It is said that by depositing goods on board an armed belligerent the right of search may be impaired, perhaps defeated.

What is this right of search? Is it a substantive and independent right wantonly, and in the pride of power, to vex and harass neutral commerce, because there is a capacity to do so? or to indulge the idle and mischievous curiosity of looking into neutral trade? or the assumption of a right to control it? If it be such a substantive and independent right, it would be better that cargoes should be inspected in port before the sailing of the vessel, or that belligerent licenses should be procured. But this is not its character.

Belligerents have a full and perfect right to capture enemy goods and articles going to their enemy which are contraband of war. To the exercise of that right the right of search is essential. It is a mean justified by the end. It has been truly denominated a right growing out of, and ancillary to the greater right of capture. Where this greater right may be legally exercised without search, the right of search can never arise or come into question.

But it is said that the exercise of this right may be prevented by the inability of the party claiming it to capture the belligerent carrier of neutral property.

And what injury results from this circumstance? If the property be neutral, what mischief is done by its escaping a search. In so doing there is no sin even as against the belligerent. if it can be effected by lawful means. The neutral cannot justify the use of force or fraud, but if by means, lawful in themselves, he can escape this vexatious procedure, he may certainly employ them.

To the argument that by placing his goods in the vessel of an

armed enemy, he connects himself with that enemy and assumes the hostile character; it is answered that no such connexion exists.

The object of the neutral is the transportation of his goods. His connexion with the vessel which transports them is the same, whether that vessel be armed or unarmed. The act of arming is not his — it is the act of a party who has a right to do so. He meddles not with the armament nor with the war. Whether his goods were on board or not, the vessel would be armed and would sail. His goods do not contribute to the armament further than the freight he pays, and freight he would pay were the vessel unarmed.

It is difficult to perceive in this argument anything which does not also apply to an unarmed vessel. In both instances it is the right and the duty of the carrier to avoid capture and to prevent a search. There is no difference except in the degree of capacity to carry this duty into effect. The argument would operate against the rule which permits the neutral merchant to employ a belligerent vessel without imparting to his goods the belligerent character.

The argument respecting resistance stands on the same ground with that which respects arming. Both are lawful. Neither of them is chargeable to the goods or their owner, where he has taken no part in it. They are incidents to the character of the vessel; and may always occur where the carrier is belligerent.

It is remarkable that no express authority on either side of this question can be found in the books. A few scanty materials, made up of inferences from cases depending on other principles, have been gleaned from the books and employed by both parties. They are certainly not decisive for or against either.

The celebrated case of the Swedish convoy [The Maria (1799), 1 C. Robinson, 340] has been pressed into the service. But that case decided no more than this, that a neutral may arm, but cannot by force resist a search. The reasoning of the judge on that occasion would seem to indicate that the resistance condemned the cargo, because it was unlawful. It has been inferred on the one side that the goods would be infected by the resistance of the ship, and on the other that a resistance which is lawful, and is not produced by the goods, will not change their character.

The case of the Catherine Elizabeth approaches more nearly to that of the Nereide, because in that case as in this there were neutral goods and a belligerent ship. It was certainly a case, not of resistance, but of an attempt by a part of the crew to

seize the capturing vessel. Between such an attempt and an attempt to take the same vessel previous to capture, there does not seem to be a total dissimilitude. But it is the reasoning of the judge and not his decision, of which the Claimants would avail themselves. He distinguishes between the effect which the employment of force by a belligerent owner or by a neutral owner would have on neutral goods. The first is lawful, the last unlawful. The belligerent owner violates no duty. He is held by force and may escape if he can. From the marginal note it appears that the reporter understood this case to decide in principle that resistance by a belligerent vessel would not confiscate the cargo. It is only in a case without express authority that such materials can be relied on.

If the neutral character of the goods is forfeited by the resistance of the belligerent vessel, why is not the neutral character of the passengers forfeited by the same cause? The master and crew are prisoners of war, why are not those passengers who did not engage in the conflict also prisoners? That they are not would seem to the Court to afford a strong argument in favor of the goods. The law would operate in the same manner on both.

It cannot escape observation, that in argument the neutral freighter has been continually represented as arming the Nereide and impelling her to hostility. He is represented as drawing forth and guiding her warlike energies. The Court does not so understand the case. The Nereide was armed, governed, and conducted by belligerents. With her force, or her conduct, the neutral shippers had no concern. They deposited their goods on board the vessel, and stipulated for their direct transportation to Buenos Ayres. It is true that on her passage she had a right to defend herself, and might have captured an assailing vessel; but to search for the enemy would have been a violation of the charter party and of her duty.

With a pencil dipped in the most vivid colors, and guided by the hand of a master, a splendid portrait has been drawn exhibiting this vessel and her freighter as forming a single figure, composed of the most discordant materials, of peace and war. So exquisite was the skill of the artist, so dazzling the garb in which the figure was presented, that it required the exercise of that cold investigating faculty which ought always to belong to those who sit on this bench, to discover its only imperfection; its want of resemblance.

The Nereide has not that centaur-like appearance which has

been ascribed to her. She does not rove over the ocean hurling the thunders of war while sheltered by the olive branch of peace. She is not composed in part of the neutral character of Mr. Pinto, and in part of the hostile character of her owner. She is an open and declared belligerent; claiming all the rights, and subject to all the dangers of the belligerent character. She conveys neutral property which does not engage in her warlike equipments, or in any employment she may make of them; which is put on board solely for the purpose of transportation, and which encounters the hazard incident to its situation; the hazard of being taken into port, and obliged to seek another conveyance should its carrier be captured.

In this it is the opinion of the majority of the Court there is nothing unlawful. The characters of the vessel and cargo remain as distinct in this as in any other case. The sentence, therefore, of the Circuit Court must be reversed, and the property claimed by Manuel Pinto for himself and his partners, and for those other Spaniards for whom he has claimed, be restored, and the libel as to that property, be dismissed.

[Mr. Justice Johnson delivered a concurring opinion, and Mr. Justice Story, for himself and one other, delivered a dissenting opinion.]

THE MIRAMICHI.

Admiralty Division (in Prize) of the High Court of Justice of Great Britain. 1914.
Law Reports [1915] P. 71.

[In June, 1914, an American firm contracted to sell 16,000 bushels of wheat to certain firms in Germany. The wheat was loaded upon the British ship Miramichi at Galveston, Texas, in July, 1914. The whole transaction was in entire innocence of any anticipation of war. The shippers obtained the bill of lading and drew a bill of exchange upon the buyers which was discounted by the Guaranty Trust Co. of New York, to whom the sellers delivered the bill of lading, which was to be delivered to the buyer on payment of the bill of exchange. En route to Rotterdam, the owners of the vessel ordered her to put into a British port because of the outbreak of war. While in a British port the cargo was seized as prize. The bill of exchange was presented to the buyers, who refused to accept it or to pay the sum due. The sellers and the Guaranty Trust Co. appear as claimants

and base their argument on the ground that the cargo is neutral property.]

Sir Samuel Evans, President. . . . The question of law . . . is, was the cargo on September 1 subject to seizure or capture by or on behalf of the Crown as droits of admiralty or as prize?

Before this question is dealt with, I desire to point out, and to emphasize, that nothing which I shall say in this case is applicable to capture or seizure at sea or in port of any property dealt with during the war, or in anticipation of the war. Questions relating to such property are on an entirely different footing from those relating to transactions initiated during the happier times of peace. The former are determined largely or mainly upon considerations of the rights of belligerents and of attempts to defeat such rights. . . .

In the case now before the Court there is no place for any idea of an attempt to defeat the rights of this country as a belligerent; and the case has to be determined in accordance with the principles by which rights of property are ascertained by our law in time of peace. . . .

Very difficult questions often arise at law as to when the property in goods carried by sea is transferred, or vests; and at whose risk goods are at a particular time, or who suffers by their loss. These are the kind of questions which are often brushed aside in the Prize Court when the transactions in which they are involved take place during war or were embarked in when war was imminent or anticipated. But where, as in the present case, all the material parts of the business transaction took place *bona fide* during peace, and it becomes necessary to decide questions of property, I hold that the law to be applied is the ordinary municipal law governing contracts for the sale and purchase of goods.

Where goods are contracted for to be sold and are shipped during peace without any anticipation of imminent war, and are seized or captured afloat after war has supervened, the cardinal principle is, in my opinion, that they are not subject to seizure or capture unless under the contract the property in the goods has by that time passed to the enemy. It may be that the element of risk may legitimately enter into the consideration of the question whether the property has passed or has become transferred. But the incidence of risk or loss is not by any means the determining factor of property or ownership. . . .

The main determining factor is whether, according to the intention of seller and buyer, the property had passed.

The question which governs this case, therefore, is, whose property were the goods at the time of seizure? . . .

In my opinion, the result of the many decisions . . . is that, in the circumstances of the present case, the goods had not, at the time of seizure, passed to the buyers; but that the sellers had reserved a right of disposal or a *jus disponendi* over them, and that the goods still remained their property, and would so remain until the shipping documents had been tendered to and taken over by the buyer, and the bill of exchange for the price had been paid.

It follows that the goods seized were the property of the American claimants, and were not subject to seizure; the Court decrees accordingly, and orders the goods to be released to the claimants. . . .

NOTE.—Accord: The Parchim (1915), 1 Br. & Col. P. C. 579; The Kronprinzessin Cecilie (1915), 1 Ib. 623.

The right of visit and search was one of the first belligerent rights to obtain recognition. As early as the reign of Edward III (1327-1377), resistance to visit and search was held to justify condemnation. In 1512, more than a century before Grotius' great work appeared, Henry VIII instructed the commander of his fleet in these words:

> If any Shippe or Shippes of the Flete mete any other Shippes or Vessels on the See, or in Porte or Portes, making Rebellion, Resistance, or Defence, ayenst them, then it is lawfull for them to assaulte and take theym with strong hand, to bring them holy and entierly to the said Admiral without dispoyllyng, rifelyng, or enbeselyng of the Goods, or doing harme to the Parties, ther t'abyde th' Ordinance of the Lawe, as the said Admirall shall awarde.
>
> Rymer, *Foedera*, VI, Part I, 32.

The right of visit and search is strictly a war right and may be exercised only in time of war, Le Louis (1817), 2 Dodson, 210, 245; The Marianna Flora (1826), 11 Wheaton, 1; The Ship Rose (1901), 36 Ct. Cl. 290; The Brig Fair American (1904), 39 Ib. 184. Hence in the absence of treaty, merchant vessels may not be stopped by the cruisers of other countries on suspicion that they are engaged in the slave trade, The Antelope (1825), 10 Wheaton, 66. The right may be exercised only in belligerent waters or on the high seas, The Vrow Anna Catherina (1806), 5 C. Robinson, 15. The search must be conducted with due regard to the rights and safety and convenience of the vessel detained, The Anna Maria (1817), 2 Wheaton, 327, and when that is done any incidental injury resulting from detention is *damnum absque injuria* which must be submitted to, The Eleanor (1817), 2 Wheaton, 345; The Juno (1914), 1 Br. & Col. P. C. 151; The Tredegar Hall (1915), 1 Ib. 492. Since a belligerent has a right to

search all merchant vessels on the high seas, resistance to search is a wrong which justifies condemnation, The Ship Rose (1901), 36 Ct. Cl. 290; The Schooner Jane (1901), 37 Ib. 24, and forfeits neutral protection, Maley v. Shattuck (1806), 3 Cranch, 458; The Baigorry (1865), 2 Wallace, 474. The same penalty was imposed in the case of an attempted rescue by a neutral crew after capture, The Catherina Elizabeth (1804), 5 C. Robinson, 232, but mere flight unaccompanied by resistance does not warrant condemnation, The Mentor (1810), Edwards, 207. Acceptance of a belligerent convoy is constructive resistance,—that is, it is such an abandonment of neutrality and alliance with the enemy as will justify a belligerent in attacking without first searching, The Elsebe (1804), 5 C. Robinson, 173; The Nancy (1892), 27 Ct. Cl. 99; The Sea Nymph (1901), 36 Ib. 369; The Ship Galen (1901), 37 Ib. 89. Whether a neutral ship under the convoy of a neutral war vessel is exempt from search was long a subject of controversy. Until 1908 Great Britain refused to recognize such a result, but in the Declaration of London, articles 61 and 62, she admitted the right of convoy. A vessel may also be condemned if it sails under an enemy license, The Julia (1814), 8 Cranch, 181; The Aurora (1814), 8 Ib. 203; The Hiram (1816), 1 Wheaton, 440; The Ariadne (1817), 2 Ib. 143; The Adula (1900), 176 U. S. 361. A vessel may be seized if her papers are not in proper form, The Sarah (1801), 3 C. Robinson, 330; The Dos Hermanos (1817), 2 Wheaton, 76; The Pizarro (1817), 2 Ib. 227; The Caroline (1855), Spinks, 252; The Peterhoff (1866), 5 Wallace, 28. Neutral goods found upon an armed enemy merchantman have been condemned by British prize courts, The Fanny (1814), 1 Dodson, 443, but this seems to be unduly rigorous and in such cases American prize courts release the goods, The Nereide (1815), 9 Cranch, 388. Neutral property which is fraudulently blended with enemy property shares the fate of the latter, The St. Nicholas (1816), 1 Wheaton, 417; The Fortuna (1818), 3 Ib. 236. The right of capture was much restricted by the adoption in 1856 of the four rules of the Declaration of Paris (*ante*, p. 9), the second and third of which exempted from capture all neutral goods except contraband, and all enemy goods in neutral ships except contraband. But goods on an enemy ship bound to an enemy port are prima facie enemy goods, and a neutral claimant of such goods must satisfy the court by clear proof, The Roland (1915), 31 T. L. R. 357. Enemy goods which have been voluntarily removed from a neutral ship and placed in lighters at once lose the protection of the neutral flag and are subject to seizure, The Anastassios Koroneos (Malta, 1915), 1 Br. & Col. P. C. 519.

Ever since the war between the United States and Mexico, when the American Government allowed mail steamers to enter and depart from Vera Cruz at will, a sentiment in favor of the exemption of the mails from visit and search has been growing up and found expression in the Eleventh Hague Convention of 1907, which declared "postal correspondence of neutrals or belligerents" to be inviolable. There would seem to be no reason, however, why contraband carried in the mails should be treated any differently from contraband carried in any other way. In the Great War, the wide use made of the parcel post for the carriage of such contraband articles as rubber, wool, and even revolvers (400 revolvers were found in the mails on one steamer) naturally led to a strict construction of the term "postal correspondence," The Tubantia (1916), 32 T. L. R. 529. The

subject is ably discussed in Secretary Lansing's note of May 24, 1916, to the British Ambassador, criticised in *Am. Jour. Int. Law*, X, 580.

On the whole subject see the able brief of Richard Henry Dana in The Prize Cases (1863), 2 Black, 635, 650; Atherley-Jones, chs. v-viii; Cobbett, *Cases and Opinions*, II, 478; Pyke, *The Law of Contraband of War*, ch. xv; Moore, *Digest*, VII, ch. xxiv; *Int. Law Topics, 1905*, 9, 48, 107; Ib. *1913*, 113; *Int. Law Situations, 1901*, 99; Ib. *1907*, 60; Ib. *1911*, 37; Earl Loreburn, *Capture at Sea*, chs. ii and iii.

Section 3. Transfers in Transitu.

THE VROW MARGARETHA.

High Court of Admiralty of Great Britain. 1799.
1 C. Robinson, 336.

This was a case of a cargo of brandies, shipped by Spanish merchants in Spain, in May, 1794, before Spanish hostilities, and transferred to Mr. Berkeymyer at Hamburgh, during their voyage to Holland. . . .

Sir W. Scott [Lord Stowell]—This is a claim of Mr. Ph. Berkeymyer of Hamburgh for some parcels of wine which were seized on board three Dutch vessels detained by order of government in 1795. The ships have been since condemned; the cargoes were described in the ship's papers, as far as the property was expressed, as belonging to Spanish merchants. It is material, in this case, to consider the relative situation of the countries from which and to which these cargoes were going. Spain and Holland were then in alliance with this country and at war with France; it might, therefore, be an inducement with a Spanish merchant to conceal the property of his goods, although it does not appear to have existed in any great degree, as the goods were coming under an English convoy, and as they were shipped as Spanish wines, and destined, avowedly, to Holland; there was, therefore, nothing in this part of the case to mislead our cruisers. Mr. Berkeymyer is allowed to be an inhabitant of Hamburgh, although he had made a journey, a short time previous to the shipment of these cargoes, to Spain, (where he had resided some years before), to settle his affairs, and bring off the property which he had left behind him. He had quitted Spain, however, previous to the breaking out of Spanish hostilities, and had resumed his original character of a merchant of Hamburgh.—The account which he gives of his transactions in Spain,

as far as they regard this case, is, that he entered into a contract with two Spanish houses for some wines, which were at the time actually shipped, and *in itinere* towards Holland. The first objection that has been taken is, that such a transfer is invalid, and cannot be set up in a Prize Court, where the property is always considered to remain in the same character in which it was shipped till the delivery. If that could be maintained there would be an end of the question, because it has been admitted that these wines were shipped as Spanish property, and that Spanish property is now become liable to condemnation. But I apprehend it is a position which cannot be maintained in that extent. In the ordinary course of things in time of peace — for it is not denied that such a contract may be made, and effectually made (according to the usage of merchants) such a transfer *in transitu* might certainly be made. It has even been contended that a mere delivering of the bill of lading is a transfer of the property. But it might be more correctly expressed, perhaps, if said that it transfers only the right of delivery; but that a transfer of the bill of lading, with a contract of sale accompanying it, may transfer the property in the ordinary course of things, so as effectually to bind the parties, and all others, cannot well be doubted. When war intervenes, another rule is set up by Courts of Admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy. If such a rule did not exist, all goods shipped in the enemy's country, would be protected by transfers which it would be impossible to detect. It is on that principle held, I believe, as a general rule, that property cannot be converted *in transitu;* and in that sense I recognize it as the rule of this Court. But this arises, as I have said, out of a state of war, which creates new rights in other parties, and cannot be applied to transactions originating, like this, in a time of peace. The transfer, therefore, must be considered as not invalid in point of law, at the time of the contract; and being made before the war, it must be judged according to the ordinary rules of commerce.

It has been farther objected to the validity of this contract, that a part of the wines did actually reach Holland, where they were sold, and the money was detained by the consignees in payment of the advances which they had made. It is said that this annuls the contract—to the extent of that part it may do so, and the deficiency must be made up to the purchaser by other

means; but it appears that it has been actually supplied by bills of exchange, and an assignment of other wines sent to Petersburgh. It is not for me to set aside the whole contract on that partial ground, or to construe the defect in the execution of the contract so rigorously as to extend it to those wines which never went to Holland, and which never became *de facto* subject to be detained by the consignees. They are free for the contract to act upon; and if the parties are desirous of adhering to their contract in its whole extent, it does not become other persons to obstruct them.

It comes then to a question of fact, whether it was a *bona fide* transfer or not? I think the time is a strong circumstance to prove the fairness of the transaction. Had it happened three months later, there might have been reason to alarm the prudence of Spanish merchants, and induce them to resort to the expedient of covering their property.—But at the time of the contract there seems to have been no reason for apprehension, and therefore there is nothing to raise any suspicion on that point. . . . The impression upon my mind is, that it is a fair transaction. . . . Mr. Berkeymyer's claims were restored without opposition.

THE BALTICA.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1857.
11 Moore, Privy Council, 141.

On appeal from the High Court of Admiralty of England.

[War being imminent between Russia and Great Britain, the owner of the Russian ship Baltica, a Dane long domiciled at Libau, Russia, sold the vessel to his son, who was a citizen of Denmark. At the time of the sale the vessel was in transit from Libau to Copenhagen with a cargo consigned to Leith, Scotland. On its arrival at the Danish port, it was delivered to the purchaser, the Danish flag was raised over it, and it was registered as a Danish vessel. Two months later, it sailed from Copenhagen to Leith, and upon arrival at that port it was seized as prize. The Crown argued that the sale of the vessel to a Danish citizen was invalid because made while the vessel was *in transitu*.]

The Right HON. T. PEMBERTON LEIGH [LORD KINGSDOWN]: . . . The general rule is open to no doubt. A neutral

while a war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port. During a time of peace, without prospect of war, any transfer which is sufficient to transfer the property between the vendor and vendee, is good also against a Captor, if war afterwards unexpectedly breaks out. But, in case of war, either actual or imminent, this rule is subject to qualification, and it is settled that in such case a mere transfer by documents which would be sufficient to bind the parties, is not sufficient to change this property as against Captors, as long as the ship or goods remain *in transitu*. . . .

The only question of law which can be raised in this case, is not whether a transfer of a ship or goods *in transitu*, is ineffectual to change the property, as long as the state of *transitus* lasts; but how long that state continues, and when, and by what means, it is terminated.

In order to determine the question, it is necessary to consider upon what principle the rule rests, and why it is that a sale which would be perfectly good if made while the property was in a neutral port, or while it was in an enemy's port, is ineffectual if made while the ship is on her voyage from one port to the other. There seem to be but two possible grounds of distinction. The one is, that while the ship is on the seas, the title of the vendee cannot be completed by actual delivery of the vessel or goods; the other is, that the ship and goods having incurred the risk of capture by putting to sea, shall not be permitted to defeat the inchoate right of capture by the belligerent Powers, until the voyage is at an end.

The former, however, appears to be the true ground on which the rule rests. Such transactions during war, or in contemplation of war, are so likely to be merely colourable, to be set up for the purpose of misleading, or defrauding Captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great, that the Courts have laid down as a general rule, that such transfers, without actual delivery, shall be insufficient; that in order to defeat the Captors, the possession, as well as the property, must be changed before the seizure. It is true that, in one sense, the ship and goods may be said to be *in transitu* till they have reached their original port of destination; but their Lordships have found no case where the

transfer was held to be inoperative after the actual delivery of the property to the owner. . . .

There can be no manner of doubt, therefore, that at this time [i. e. when the vessel sailed from Copenhagen for Leith] the ship had come fully into the possession of the purchaser, and thereupon, according to the principles already referred to, the *transitus,* in the sense in which for this purpose the word is used, had ceased. . . .

Their Lordships will report to Her Majesty their opinion, that . . . an order for restitution [should be made.]

THE BENITO ESTENGER.

SUPREME COURT OF THE UNITED STATES. 1900.
176 U. S. 568.

Appeal from the District Court of the United States for the Southern District of Florida.

[The Benito Estenger was captured by a public vessel of the United States off the coast of Cuba on June 27, 1898, taken to the port of Key West, Florida, libelled, and condemned. From the decree of condemnation the claimant appeals on the ground, *inter alia,* that the vessel at the time of capture was no longer a Spanish vessel, having been transferred on June 9, 1898, to a British subject and registered at Kingston, Jamaica, as a British vessel. The principal question was as to the validity of this transfer. Further facts appear in the opinion of the court.]

Mr. Chief Justice FULLER, after stating the case, delivered the opinion of the court.

If the alleged transfer was colorable merely, and Messa was the owner of the vessel at the time of capture, did the District Court err in condemning the Benito Estenger as lawful prize as enemy property?

"Enemy property" is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law. The general rule is that in war the citizens or subjects of the belligerents are enemies to each other without regard to individual sentiments or dispositions, and that political status determines the question of enemy ownership. And by the law of prize, property engaged in any illegal intercourse with the enemy is deemed enemy property,

whether belonging to an ally or a citizen, as the illegal traffic stamps it with the hostile character and attaches to it all the penal consequences. Prize Cases, 2 Black, 635, 674; The Sally, 8 Cranch, 382, 384; Jecker v. Montgomery, 18 How. 110; The Peterhoff, 5 Wall. 28; The Flying Scud, 6 Wall. 263. . . .

Thus far we have proceeded on the assumption that the transfer of the Benito Estenger was merely colorable, and this, if so, furnished in itself ground for condemnation. A brief examination of the evidence, in the light of well-settled principles, will show that the assumption is correct.

Messa's story of the transfer was that the steamer had been owned by Gallego, Messa and Company, and then by himself; that he was compelled to sell in order to get money to live on; that he made the sale for $40,000, for which, or a large amount of which, credit was given on an indebtedness of Messa to Beattie and Company, and that he was employed by Beattie to go on the vessel as his representative and business manager. . . .

In short, the statements as to price were conflicting; the reason assigned for the sale was to get money to live on, and yet apparently no money passed, and Messa said that he received credit for a large part of the consideration on indebtedness to claimant's firm; claimant himself refused to describe the payment or payments; the Spanish master and crew remained in charge; Messa went on the voyage as supercargo; the vessel continued in trade, which, in this instance, at least, appeared to be plainly trade with the enemy; and, finally, it is said by claimant's counsel in his printed brief: "It will not be contended upon this appeal that all the interest of Mr. Messa in the Benito Estenger ceased on June 9, 1898. The transfer was obviously made to protect the steamer as neutral property from Spanish seizure. That Mr. Messa, however, still retained a beneficial interest after this sale and transfer of flags, and continued to act for the vessel as supercargo, has not been disputed."

The attempt to break the force of this admission by the contention that the change of flag was justifiable as made to avoid capture by the Spanish is no more than a reiteration of the argument that Messa was a Cuban rebel, and his vessel a Cuban vessel, which, as has been seen, we have been unable to concur in. If the transfer were invalid, she belonged to a Spanish subject, she was engaged in an illegal venture, and her owner cannot plead his fear of Spanish aggression.

Transfers of vessels *flagrante bello* were originally held in-

valid, but the rule has been modified, and is thus given by Mr. Hall, who, after stating that in France "their sale is forbidden, and they are declared to be prize in all cases in which they have been transferred to neutrals after the buyers could have knowledge of the outbreak of the war;" says: "In England and the United States, on the contrary, the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinized, and the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war." International Law (4th ed.), 525. And to the same effect is Mr. Justice Story in his Notes on the Principles and Practice of Prize Courts, (Pratt's ed.) 63; 2 Wheat. App. 30: "In respect to the transfers of enemies' ships during the war, it is certain that purchases of them by neutrals are not, in general, illegal; but such purchases are liable to great suspicion; and if good proof be not given of their validity by a bill of sale and payment of a reasonable consideration, it will materially impair the validity of a neutral claim; . . . and if after such transfer the ship be employed habitually in the enemy's trade, or under the management of a hostile proprietor, the sale will be deemed merely colorable and collusive. . . . Anything tending to continue the interest of the enemy in the ship vitiates a contract of this description altogether."

The Sechs Geschwistern, 4 C. Rob. 100, is cited, in which Sir William Scott said: "This is the case of a ship asserted to have been purchased of the enemy; a liberty which this country has not denied to neutral merchants, though by the regulation of France it is entirely forbidden. The rule which this country has been content to apply is, that property so transferred must be *bona fide* and absolutely transferred; that there must be a sale divesting the enemy of all further interest in it; and that anything tending to continue his interest, vitiates a contract of this description altogether."

In The Jemmy, 4 C. Rob. 31, the same eminent jurist observed: "This case has been admitted to farther proof, owing entirely to the suppression of a circumstance, which if the court had known, it would not have permitted farther proof to have been introduced; namely, that the ship has been left in the trade, and

under the management of her former owner. Wherever that fact appears, the court will hold it to be conclusive, because, from the *evidentia rei*, the strongest presumption necessarily arises, that it is merely a covered and pretended transfer. The presumption is so strong that scarcely any proof can avail against it. It is a rule which the court finds itself under the absolute necessity of maintaining. If the enemy could be permitted to make a transfer of the ship, and yet retain the management of it, as a neutral vessel, it would be impossible for the court to protect itself against frauds."

And in The Omnibus, 6 C. Rob. 71, he said: "The court has often had occasion to observe, that where a ship, asserted to have been transferred, is continued under the former agency and in the former habits of trade, not all the swearing in the world will convince it that it is a genuine transaction."

The rule was stated by Judge Cadwalader of the Eastern District of Pennsylvania thus: "The rule of decision in some countries has been that, as to a vessel, no change of ownership during hostilities can be regarded in a prize court. In the United States, as in England, the strictness of this rule is not observed. But no such change of property is recognized where the disposition and control of a vessel continue in the former agent of the former hostile proprietors; more especially when, as in this case, he is a person whose relations of residence are hostile." The Island Belle, 13 Fed. Cases, 168. . . .

In The Soglasie, Spinks Prize Cases, 104, Dr. Lushington held the *onus probandi* to be upon the claimant, and made these observations: "With regard to documents of a formal nature, though when well authenticated they are to be duly appreciated, it does not follow that they are always of the greatest weight, because we know, without attributing blame to the authorities under which they issue, they are instruments often procured with extraordinary facility. What the court especially desires is, that testimony which bears less the appearance of formality,—evidence natural to the transaction, but which often carries with it a proof of its own genuineness; the court looks for that correspondence and other evidence which naturally attends the transaction, accompanies it, or follows it, and which when it bears upon the face of it the aspect of sincerity, will always receive its due weight."

In The Ernst Merck, Spinks Prize Cases, 98, the sale was to neutrals of Mecklenburg shortly before the breaking out of war, and it was ruled that the onus of giving satisfactory proof of the

sale was on the claimant, and without it the court could not restore, even though it was not called on to pronounce affirmatively that the transfer was fictitious and fraudulent. In that case the vessel was condemned partly because of absence of proof of payment, Dr. Lushington saying: "We all know that one of the most important matters to be established by a claimant is undoubted proof of payment."

To the point that the burden of proof was on the claimant see also The Jenny, 5 Wall. 183; The Amiable Isabella, 6 Wheat. 1; The Lilla, 2 Cliff. 169; Story's Prize Courts, 26.

We think that the requirements of the law of prize were not satisfied by the proofs in regard to this transfer, and on all the evidence are of opinion that the court below was right in the conclusion at which it arrived. *Decree affirmed.*

Mr. Justice Shiras, Mr. Justice White and Mr. Justice Peckham dissented.

THE SOUTHFIELD.

Admiralty Division (in Prize) of the High Court of Justice of Great Britain. 1915.
1 British and Colonial Prize Cases, 332.

Suit for condemnation of cargo as prize.

[On July 16, 1914, the British steamship Southfield left Novorossiisk, a Russian Black Sea port, with a cargo of barley shipped by a firm of German merchants, and consigned "to order, Emden." During the voyage the goods were sold to two Dutch merchants, Henkers and Barghoorn, carrying on business in Holland. The dealings with Henkers took place between July 20 and July 27 and those with Barghoorn between July 24 and July 31. Both merchants at once re-sold to customers of their own. War broke out between Great Britain and Germany on August 4. The Southfield reached England August 8, and her cargo was seized as prize and sold. The Dutch merchants claim the proceeds on the ground that their title was complete and was not acquired in contemplation of war.]

Sir Samuel Evans (The President). . . . It is important to examine closely the principle which governs the right of

capture of goods transferred *in transitu*, and to ascertain accurately its limits, as it is sometimes apt to be loosely stated.

In order to deduce the rule, it will be sufficient, I think, to refer to two leading cases, and to one authorized text book. I take them in order of date. [His Lordship here quoted from The Vrow Margaretha, 1 C. Robinson, 336, the passage beginning, "In the ordinary course of things in time of peace," *ante*, p. 305.]

In the work of Mr. Justice Story on The Principles and Practice of Prize Courts, that celebrated jurist states the rule in the following passage (Pratt's Edition, pp. 64-65): "In respect to the proprietary interests in cargoes, though, in general, the rules of the common law apply, yet there are many peculiar principles of prize law to be considered; it is a general rule, that, during hostilities, or imminent and impending danger of hostilities, the property of parties belligerent cannot change its national character during the voyage, or, as it is commonly expressed, *in transitu*. This rule equally applies to ships and cargoes; and it is so inflexible that it is not relaxed, even in owners who become subjects by capitulation after the shipment and before the capture. . . . The same distinction is applied to purchases made by neutrals of property *in transitu*, if purchased during a state of war existing or imminent, and impending danger of war, the contract is held invalid, and the property is deemed to continue as it was at the time of shipment until the actual delivery. It is otherwise, however, if a contract be made during a state of peace, and without contemplation of war; for, under such circumstances, the Prize Courts will recognize the contract and enforce the title acquired under it. . . . The reason why Courts of Admiralty have established this rule as to transfers *in transitu* during a state of war or expected war, is asserted to be, that if such a rule did not exist all goods shipped in the enemy's country would be protected by transfers, which it would be impossible to detect."

[His Lordship then quoted the passage from The Baltica, 11 Moore, Privy Council, 141, beginning with the words, "The general rule is open to no doubt," *ante*, p. 306.]

It might be argued that according to these authorities transfers *in transitu* are invalid against belligerent captors upon the intervention of war unless there is actual delivery before capture; or, in other words, that if war has intervened no transfer by documents alone can defeat the right of capture. But, in my opinion, that proposition is too wide, and is not an accurate

delimitation of the true rule. In the passages cited Lord Stowell speaks of "a state of war existing or imminent"; Mr. Justice Story of "a state of war existing or imminent and impending danger of war"; and Lord Kingsdown of "war, either actual or imminent," of "war unexpectedly breaking out" (contrasting it with "a time of peace, without prospect of war"), and of "transactions during war or in contemplation of war," . . .

In my view the element that the vendor contemplated war, and had the design to make the transfer in order to secure himself and to attempt to defeat the rights of belligerent captors, is necessarily involved in the rule which invalidates such transfers. Sales of goods upon ships afloat are now of such common occurrence in commerce that it would be too harsh a rule to treat such transfers as invalid unless such an element existed. . . .

As to the facts in these two cases, it is abundantly clear that the neutral purchasers acted with complete *bona fides* throughout; they paid for the goods, and re-sold them to neutral customers of their own before war was declared. This would not necessarily conclude the matter.

But I am also satisfied that the vendors did not have the war between their country and this country (to which the ship carrying the goods belonged) in contemplation when they sold the goods. The imminence of war between Germany and Russia has no materiality in considering these cases. In the light of after events, the war with this country may be spoken of as having been imminent, regarded from the point of view of time, in the last two weeks of July; but there is no evidence that it was regarded as imminent in its proper meaning of "threatening or about to occur" by German merchants at that time. . . . What the hidden anticipation of the Government of the German Empire might have been upon the subject it is not for me to speculate; but I may express my humble opinion that our intervention in the war upon the invasion of Belgium in defence of treaty obligations, against the breach of such obligations by the invaders, was a complete surprise even to their Government. . . .

On the grounds that the German vendors had no thought of the imminence of war between Germany and this country, and did not have such a war in contemplation at any time while the transactions of sale were taking place or before they were completed, I hold that the sales to the two Dutch merchants were valid, and that the goods were not confiscable. And I decree the

release to them respectively of the net proceeds of the sale of their respective goods, which are now in Court.

NOTE.—The transfer of enemy ships either in anticipation of war or in the midst of war offers so many opportunities for fraud that such transactions are regarded by prize courts with great suspicion. In the following cases vessels which had been transferred to neutrals were condemned for the reasons indicated: The Sechs Geschwistern (1801), 4 C. Robinson, 100 (seller retained right to repurchase after the war); The Vigilantia (1798), 1 C. Robinson, 1, The Embden (1798), 1 Ib. 16, The Ernst Merck (1854), Spinks, 98 (vessel transferred to a neutral continued in former trade); The Bernon (1798), 1 C. Robinson, 102, The Jemmy (1801), 4 Ib. 31, The Andromeda (1864), 2 Wallace, 481 (management of vessel retained by former owner); The General Hamilton (1805), 6 C. Robinson, 61 (transfer of enemy vessel in a blockaded port to a neutral); The Johann Christoph (1854), Spinks, 60, The Rapid (1854), Ib. 80 (no proof of payment of purchase price); The Tommi and The Rothersand (1914), L. R. [1914] P. 251 (vessel still flying an enemy flag). On the other hand, in The Ariel (1857), 11 Moore, P. C. 119, a sale which was admittedly made in contemplation of war was held valid because the transfer was undoubtedly bona fide.

The sale to a neutral of an enemy ship of war lying in a neutral port is invalid, The Minerva (1807), 6 C. Robinson, 396, even though it has been dismantled and fitted up as a merchant ship, The Georgia (1867), 7 Wallace, 32.

France, Germany and Russia have heretofore treated all transfers of enemy vessels made after the outbreak of war as absolutely invalid. Austria-Hungary and Japan have followed the Anglo-American rule as to the recognition of transfers which can be shown to be bona fide. But the Great War has cut across this alignment and has resulted in the curious situation that whether a transfer is recognized as valid or not depends on which member of a group of allied states passes upon it. Thus the Dacia, a German vessel lying in an American port and purchased by an American citizen after the outbreak of war and admitted to American registry, would be regarded under the old British rule as an American vessel since there was nothing in the facts to impeach the good faith of the transaction and the sale had been completed by delivery to the purchaser. But the vessel was captured by a French cruiser and was condemned as a German vessel by the French Prize Court. See the decision in *Am. Jour. Int. Law*, IX, 1015. The Anglo-American rule whereby the validity of a transfer is determined by its bona fide character is preferable to the rule followed by France, Germany and Russia, but it is eminently desirable that the nations should be in agreement upon some rule. The Declaration of London, Art. 56, provides that a transfer after the opening of hostilities is void, "unless it is proved that such transfer was not made in order to evade the consequence which the enemy character of the vessel would involve." In its practical application this amounts almost to an adoption of the French rule, for most of the transfers of vessels from enemy to neutral flags after the outbreak of war are for the purpose of evading the consequences of enemy character. Furthermore to throw upon the purchaser the burden of proving an innocent state of mind on the part of the seller at the time of the transfer—an event which may have happened many months before the

capture—is to require a practical impossibility. If the purchaser can show that there was a genuine transfer in which the vendor parted with all his interest in the vessel and that the transfer of ownership was completed by delivery, the purchaser's title should be everywhere recognized.

For an excellent treatment of the subject see J. W. Garner, "The Transfer of Merchant Vessels from Belligerent to Neutral Flags," *Am. Law Rev.* XLIX, 321. See also *Int. Law Topics, 1906,* 21; Ib. *1913,* 155; *Int. Law Situations, 1910,* 108; Russell T. Mount, "Prize Cases in the English Courts Arising out of the Present War," *Col. Law Rev.* XV, 316, 567; Moore, *Digest,* VII, 415.

Section 4. The Rights of Intermediate Parties.

THE ODESSA.

Judicial Committee of the Privy Council of Great Britain. 1915. Law Reports [1916] 1 A. C. 145.

Consolidated Appeals from two decrees of the Prize Court (England) . . . reported as to The Odessa, [1915] P. 52. [All that pertains to The Woolston is omitted.] The appellants in both appeals were . . . bankers carrying on business in London. . . . The cargo [of The Odessa], consisting of nitrate of soda, was sold by a Chilean firm to a German company carrying on business at Hamburg, and was shipped in May, 1914, "bound for Channel for orders." In June, 1914, the appellants accepted bills of exchange for 41,153*l.* 1*s.* 5*d.* (the price of the cargo) drawn by the sellers, and as security received and held the bill of lading which made the cargo deliverable to them or to their assigns. On August 4, 1914, while the ship was on her voyage, war broke out between Great Britain and Germany, and on August 19, 1914, the ship was captured at sea. A writ was issued by the Procurator-General claiming that the ship and cargo belonged to enemies of the Crown and were liable to confiscation as lawful prize. The appellants claimed the cargo alleging that it was their property and / or as holders of the bill of lading for full value.

The President of the Probate, Divorce, and Admiralty Division (Sir Samuel Evans), . . . held that the cargo was the property of the German company and that the appellants were merely pledgees and not entitled to have the cargo released to them; he therefore made a decree condemning the cargo as lawful prize.

Lord Mersey. . . . Their Lordships are of opinion that the learned President was right in the inferences which he drew

from the facts, namely, that the general property in the cargo was in the German company, and that the appellants were merely pledgees thereof at the date of the seizure. . . . The appellants indeed did not dispute the correctness of these inferences, but what they say is that, though correct, they do not justify a decree which has the effect of forfeiting their rights as pledgees. Thus the question in the appeal is whether in case of a pledge such as existed here a Court of Prize ought to condemn the cargo, and, if so, whether it should direct the appellants' claim to be paid out of the proceeds to arise from the sale thereof.

It is worth while to recall generally the principles which have hitherto guided British Courts of Prize in dealing with a claim by a captor for condemnation. All civilized nations up to the present time have recognized the right of a belligerent to seize, with a view to condemnation by a competent Court of Prize, enemy ships found on the high seas or in the belligerent's territorial waters and enemy cargoes. But seizure does not, according to British prize law, affect the ownership of the thing seized. Before that can happen the thing seized, be it ship or goods, must be brought into the possession of a lawfully constituted Court of Prize, and the captor must then act for and obtain its condemnation as prize. The suit may be initiated by the representative of the capturing State, in this country by the Procurator-General. It is a suit *in rem*, and the function of the Court is to inquire into the national character of the thing seized. If it is found to be of enemy character, the duty of the Court is to condemn it; if not, then to restore it to those entitled to its possession. The question of national character is made to depend upon the ownership at the date of seizure, and is to be determined by evidence. The effect of a condemnation is to divest the enemy subject of his ownership as from the date of the seizure and to transfer it as from that date to the Sovereign or to his grantees. The thing—the *res*—is then his for him to deal with as he thinks fit, and the proceeding is at an end.

As the right to seize is universally recognized, so also is the title which the judgment of the Court creates. The judgment is of international force, and it is because of this circumstance that Courts of Prize have always been guided by general principles of law capable of universal acceptance rather than by considerations of special rules of municipal law. Thus it has come about that in determining the national character of the thing seized the Courts in this country have taken ownership as the criterion, meaning by ownership the property or *dominium* as opposed to

any special rights created by contracts or dealings between individuals, without considering whether these special rights are or are not, according to the municipal law applicable to the case, proprietary rights or otherwise. The rule by which ownership is taken as the criterion is not a mere rule of practice or convenience; it is not a rule of thumb. It lays down a test capable of universal application, and therefore peculiarly appropriate to questions with which a Court of Prize has to deal. It is a rule not complicated by considerations of the effect of the numerous interests which under different systems of jurisprudence may be acquired by individuals either in or in relation to chattels. All the world knows what ownership is, and that it is not lost by the creation of a security upon the thing owned. If in each case the Court of Prize had to investigate the municipal law of a foreign country in order to ascertain the various rights and interests of every one who might claim to be directly or indirectly interested in the vessel or goods seized, and if in addition it had to investigate the particular facts of each case (as to which it would have few, if any, means of learning the truth), the Court would be subject to a burthen which it could not well discharge.

There is a further reason for the adoption of the rule. If special rights of property created by the enemy owner were recognized in a Court of Prize, it would be easy for such owner to protect his own interests upon shipment of the goods to or from the ports of his own country. He might, for example, in every case borrow on the security of the goods an amount approximating to their value from a neutral lender and create in favour of such lender a charge or lien or mortgage on the goods in question. He would thus stand to lose nothing in the transaction, for the proceeds of the goods if captured would, if recovered by the lender, have to be applied by him in discharge of his debt. Again, if a neutral pledgee were allowed to use the Prize Court as a means of obtaining payment of his debt instead of being left to recover it in the enemy's Courts, the door would be opened to the enemy for obtaining fresh banking credit for his trade, to the great injury of the captor belligerent.

Acting upon the principle of this rule Courts of Prize in this country have from before the days of Lord Stowell refused to recognize or give effect to any right in the nature of a "special" property or interest or any mortgage or contractual lien created by the enemy whose vessel or goods have been seized. Liens arising otherwise than by contract stand on a different footing and

involve different considerations; but even as to these it is doubtful whether the Court will give effect to them. Where the goods have been increased in value by the services which give rise to the possessory lien, it appears to have been the practice of this Court to make an equitable allowance to the national or neutral lien-holder in respect of such services. In the judgment in The Frances, 8 Cranch, 418, speaking of freight, it is said: "On the one hand the captor by stepping into the shoes of the enemy owner of the goods is personally benefited by the labour of a friend, and ought in justice to make him proper compensation, and on the other, the shipowner, by not having carried the goods to the place of their destination, and this in consequence of the act of the captor, would be totally without remedy to recover his freight against the owner of the goods."

It is, however, unnecessary to deal with the question of liens arising apart from contract, the present case being one of pledge founded on a contract made with the enemy.

When the authorities are examined it will be found that they bear out the view that enemy ownership is the true criterion of the liability to condemnation. The case of The Tobago, 5 C. Robinson, 218, is in point. There the claimant was a British subject. In time of peace he had honestly advanced money to a French shipowner to enable the latter to repair his ship which was disabled, and by way of security had taken from the owner a bottomry bond. Afterwards war broke out with France and the vessel was captured. In the proceedings in the Prize Court for condemnation the holder of the bottomry bond asked that his security might be protected, but Lord Stowell (then Sir William Scott), after observing that the contract of bottomry was one which the Admiralty Court regarded with great attention and tenderness, went on to ask: "But can the Court recognize bonds of this kind as titles of property so as to give persons a right to stand in judgment and demand restitution of such interests in a Court of Prize?" And he states that it had never been the practice to do so. He points out that a bottomry bond works no change of property in the vessel and says: "If there is no change of property there can be no change of national character. Those lending money on such security take this security subject to all the chances incident to it, and amongst the rest, the chances of war." . . . [The learned judge here reviews the authorities.]

The appellants urged that if the Court now applies the principles illustrated by the cases above referred to very serious

injustice will be done to and serious loss incurred by neutrals or subjects who, before the commencement of the war and in the normal course of business, have made advances against bills of lading. It is to be observed that similar injustice and loss, though possibly on a less extensive scale, must have been occasioned by the application of the same rules in the eighteenth and early nineteenth centuries, and similar arguments were in fact addressed to Lord Stowell as a reason why they should not be applied in individual cases. The reason why such arguments cannot be sustained is fairly obvious. War must in its very nature work hardship to individuals, and in laying down rules to be applied internationally to circumstances arising out of a state of war it would be impossible to avoid it. All that can be done is to lay down rules which, if applied generally by civilized nations, will, without interfering with the belligerent right of capture, avoid as far as may be any loss to innocent parties. It is precisely because the recognition of liens or other rights arising out of private contracts would so seriously interfere with the belligerent rights of capture that the Courts have refused to recognize such liens or rights in spite of the hardship which may be occasioned to individuals from such want of recognition. . .

For the foregoing reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed. . .

NOTE.—For the discussion of claims of various kinds set up by intermediate parties to the ship or cargo, see The Aina (1854), Spinks, 8, The Hampton (1866), 5 Wallace, 372, The Marie Glaeser (1914), L. R. [1914] P. 218 (mortgages); The Vrou Sarah (1803), 1 Dodson, 355*n*., The Battle (1867), 6 Wallace, 498, The Russia (1904), Takahashi, 557 (claims for necessaries and disbursements); The Sechs Geschwistern (1801), 4 C. Robininson, 100, The Marianna (1805), 6 Ib. 24, The Ida (1854), Spinks, 26, The Ariel (1857), 11 Moore, P. C. 119 (liens for debt); The Frances (1814), 8 Cranch, 418 (factor's lien); The Nigretia (1905), Takahashi, 551 (salvage); The Mary and Susan (1816), 1 Wheaton, 25, The Lynchburg (1861), Blatchford, 3, The Amy Warwick (1862), 2 Sprague, 150, The Carlos F. Roses (1900), 177 U. S. 655 (assignment of bill of lading); The Tobago (1804), 5 C. Robinson, 218 (bottomry bond).

But a neutral carrier may have a lien for freight on enemy's goods, The Hoop (1799), 1 C. Robinson, 196; The Hazard (1815), 9 Cranch, 205; The Ship Societe (1815), 9 Ib. 209, The Antonia Johanna (1816), 1 Wheaton, 159. But if the goods are contraband or if the vessel is engaged in the coasting trade of the enemy, no such lien is recognized, The Emanuel (1799), 1 C. Robinson, 296.

SECTION 5. UNNEUTRAL SERVICE.

THE IMMANUEL.

HIGH COURT OF ADMIRALTY OF GREAT BRITAIN. 1799.
2 C. Robinson, 186.

This was the case of an asserted Hamburgh ship, taken 14th August 1799 on a voyage from Hamburg to St. Domingo, having in her voyage touched at Bordeaux, where she sold part of the goods brought from Hamburg, and took a quantity of iron stores and other articles for St. Domingo. A question was first raised as to the property of the ship and cargo; and 2dly, supposing it to be neutral property, Whether a trade from the mother country of France to St. Domingo, a French colony, was not an illegal trade, and such as would render the property of neutrals engaged in it liable to be considered as the property of enemies, and subject to confiscation? . . .

SIR WM. SCOTT [LORD STOWELL] . . .

Upon the mere question of property, as it respects all the goods as well as the ship, I see no reason to entertain a legal doubt. Considering them as neutral property, I shall proceed to the principal question in the case, viz. Whether neutral property engaged in a direct traffic between the enemy and his colonies, is to be considered by this Court as liable to confiscation? And first with respect to the goods.

Upon the breaking out of a war, it is the right of neutrals to carry on their *accustomed trade,* with an exception of the particular cases of a trade to blockaded places, or in contraband articles (in both which cases their property is liable to be condemned), and of their ships being liable to visitation and search in which case however they are entitled to freight and expenses. I do not mean to say that in the accidents of a war the property of neutrals may not be variously entangled and endangered; in the nature of human connections it is hardly possible that inconveniences of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it; these inconveniences are more than fully balanced by the enlargements of their commerce; the trade of the belligerents is usually interrupted in a great degree, and falls in the same degree into the lap of neutrals. But without reference to accidents of the one kind or other, the general rule is, that

the neutral has a right to carry on, in time of war, his accustomed trade to the utmost extent to which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title, than by the success of the one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title; and such I take to be the colonial trade, generally speaking.

What is the colonial trade *generally speaking?* It is a trade generally shut up to the exclusive use of the mother country, to which the colony belongs, and this to a double use:—that, of supplying a market for the consumption of native commodities, and the other of furnishing to the mother country the peculiar commodities of the colonial regions; to these two purposes of the mother country, the general policy respecting colonies belonging to the states of Europe, has restricted them. With respect to other countries, generally speaking, the colony has no existence; it is possible that indirectly and remotely such colonies may affect the commerce of other countries. The manufactures of Germany may find their way into Jamaica or Guadaloupe, and the sugar of Jamaica or Guadaloupe into the interior parts of Germany, but as to any direct communication or advantage resulting therefrom, Guadaloupe and Jamaica are no more to Germany than if they were settlements in the mountains of the moon; to commercial purposes they are not in the same planet. . . .

Upon the interruption of a war, What are the rights of belligerents and neutrals respectively regarding such places? It is an indubitable right of the belligerent to possess himself of such places, as of any other possession of his enemy. This is his common right, but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea: Such colonies are dependent for their existence, as colonies, on foreign supplies; if they cannot be supplied and defended they must fall to the belligerent of course—and if the belligerent chooses to apply his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected by it; he can have no right to apply to his own use the beneficial consequence of the mere act of the belligerent; and to say, "True it is, you have, by force of arms forced such places out of the exclusive possession of the enemy, but I will share the benefit of the con-

quest, and by sharing its benefits prevent its progress. You have in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained against the whole world, and with whom we had never presumed to interfere; but we will interpose to prevent his absolute surrender, by the means of that very opening, which the prevalence of your arms alone has affected; supplies shall be sent and their products shall be exported; you have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself; we insist to share the fruits of your victories, and your blood and treasure have been expended, not for your own interest, but for the common benefit of others."

Upon these grounds, it cannot be contended to be a *right* of neutrals, to intrude into a commerce which had been uniformly shut against them, and which is now forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies and to export their products, affects to open them to neutrals, it is not his will but his necessity that changes his system; that change is the direct and unavoidable consequence of the compulsion of war, it is a measure not of French councils, but of British force.

Upon these and other grounds, which I shall not at present enumerate, an instruction issued at an early period for the purpose of preventing the communication of neutrals with the colonies of the enemy, intended, I presume, to be carried into effect on the same footing, on which the prohibition had been legally enforced in the war of 1756; a period when Mr. Justice Blackstone observes, the decisions on the law of nations proceeding from the Court of Appeals, were known and revered by every state in Europe.

Upon further inquiry it turned out that one favoured nation, the Americans, had in times of peace been permitted, by special convention, to exercise a certain very limited commerce with those colonies of the French, and it consisted with justice that that case should be specially provided for; but no justice required that the provision should extend beyond the necessities of that case; whatever goes beyond, is not given to the demands of strict justice, but is matter of relaxation and concession. . . . Cargo, taken in at Bordeaux, condemned; ship restored, without freight.

NOTE.—While the Rule of 1756 was enforced by British prize courts, it was stoutly opposed on the Continent and in America. For the attitude of the American Government see the letter of April 12, 1805, for Madi-

son, Secretary of State, to Monroe, Minister to England, in Moore, *Digest*, VII, 1105. Madison also made it the subject of a pamphlet entitled *An Examination of the British Doctrine which subjects to capture a Neutral Trade not Open in Time of Peace.* Madison failed to perceive both the sound logic upon which the Rule is based and the advantage which it might sometime be to America to enforce it. Chancellor Kent was more far seeing. He said:

> It is very possible that, if the United States should hereafter attain that elevation of maritime power and influence which their rapid growth and great resources seem to indicate, and which shall prove sufficient to render it expedient for her maritime enemy (if such an enemy shall ever exist) to open all his domestic trade to enterprising neutrals, we might be induced to feel more sensibly than we have hitherto done the weight of the foreign jurists in favor of the policy and equity of the Rule.
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> Kent, *Commentaries*, I, 84.

Justice Story thought that the Rule was well-founded (Story, *Life and Letters of Joseph Story* I, 287), and in this opinion he was followed by Halleck, (II, 340). More recently the most eminent American student of sea power has said:

> In past days, while reading pretty extensively the arguments *pro* and *con* as to the rights and duties of neutrals in war, it has been impressed upon me that the much-abused Rule of 1756 stood for a principle which was not only strictly just, but wisely expedient.
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> Mahan, *Some Neglected Aspects of War*, 191.

The more liberal policy pursued by the chief colonial powers in allowing neutrals to participate in the trade with their dependencies and particularly Great Britain's acceptance of the Declaration of Paris of 1856, whereby enemy goods under a neutral flag, unless contraband, were made exempt from capture, seemed to put the whole question at rest so far as colonial trade is concerned. In the Russo-Japanese War, however, the principle was applied to the case of the American steamer Mortara, which was condemned by Japan for engaging in the Russian fur trade from which it was excluded in time of peace, Takahashi, 633. The question was revived by the proposal of the German delegates to the London Naval Conference of 1908 that neutral vessels engaged in a trade closed to them in time of peace should be regarded as enemy vessels. This was strongly opposed. Ultimately the Conference voted (Art. 57) that while the character of a vessel should be determined by the flag which it was entitled to fly, yet "the case in which a neutral vessel is engaged in a trade which is reserved in time of peace remains outside the scope of this rule and is in no way affected by it." This leaves the question open.

Historically the Rule of 1756 is of most interest because of its relation to the rise of the doctrine of continuous voyage. Practically the Rule is now chiefly important in connection with the coasting trade from which foreign vessels are almost everywhere excluded. If a country finding its coast besieged by a hostile fleet should open its coasting trade to

neutrals, there can be little doubt that neutral vessels engaging therein would be seized and condemned on the ground that by such participation they identified themselves with the enemy. This is all the more likely in view of the vast extent of the navigation which several powers treat as part of their coasting trade. While not employing the term *cabotage*, France excludes foreign ships from the service between France and Algiers, and by a system of preferential tariffs accomplishes the same result as to navigation between France and Tunis. Transportation between American ports on the Atlantic and Pacific coasts has always been reserved for American ships, and after the war with Spain navigation between the mainland and Porto Rico, Hawaii and the Philippines was declared to be coasting-trade and placed under the same rule. Since 1900 Russia has declared all navigation between Vladivostock and any Russian port to be coasting-trade reserved exclusively for Russian vessels. These examples show that there is still abundant reason for maintaining the Rule of 1756.

For further discussion of the subject, see The America (1759), Burrell, 210; Berens v. Rucker (1761), 1 W. Bl. 313; The Yong Vrow Adriana (1764), Burrell, 178; Brymer v. Atkins (1789), 1 H. Bl. 165; The Emanuel (1799), 1 C. Robinson, 296; The Princessa (1799), 2 Ib. 49; The Jonge Thomas (1801), 3 Ib. 233*n.*; The Anna Catharina (1802), 4 Ib. 107; The Rendsborg (1802), 4 Ib. 121; Moore, *Digest*, VII, 383; Wheaton, *Reports of the United States Supreme Court*, I, 507. The best recent discussion of the Rule of 1756 is by A. Pearce Higgins in his *War and the Private Citizen*, ch. v.

THE OROZEMBO.

High Court of Admiralty of Great Britain. 1807.
6 C. Robinson, 430.

This was a case . . . of an American vessel that had been ostensibly chartered by a merchant at Lisbon, "to proceed in ballast to Macao, and there to take a cargo to America," but which had been afterwards, by his directions, fitted up for the reception of three military officers of distinction, and two persons in civil departments in the government of Batavia, who had come from Holland to take their passage to Batavia, under the appointment of the Government of Holland. There were also on board a lady, and some persons in the capacity of servants, making in the whole seventeen passengers. . . .

Sir W. Scott [Lord Stowell].—This is the case of an admitted American vessel; but the title to restitution is impugned, on the ground of its having been employed, at the time of the capture, in the service of the enemy, in transporting military persons first to Macao, and ultimately to Batavia. That a vessel

hired by the enemy for the conveyance of military persons, is to be considered as a transport subject to condemnation, has been in a recent case held by this court, and on other occasions. What is the number of military persons that shall constitute such a case, it may be difficult to define. In the former case there were many, in the present there are much fewer in number; but I accede to what has been observed in argument, that number alone is an insignificant circumstance in the considerations, on which the principle of law on this subject is built; since fewer persons of high quality and character may be of more importance, than a much greater number of persons of lower condition. To send out one veteran general of France to take the command of the forces of Batavia, might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater; and therefore it is what the Belligerent has a stronger right to prevent and punish. In this instance the military persons are three, and there are besides, two other persons who were going to be employed in civil capacities in the government of Batavia. Whether the principle would apply to them alone, I do not feel it necessary to determine. I am not aware of any case in which that question has been agitated; but it appears to me on principle to be but reasonable that, whenever it is of sufficient importance to the enemy, that such persons should be sent out on the public service, at the public expence, it should afford equal ground of forfeiture against the vessel, that may be let out for a purpose so intimately connected with the hostile operations.

It has been argued, that the master was ignorant of the character of the service on which he was engaged, and that, in order to support the penalty, it would be necessary that there should be some proof of delinquency in him, or his owner. But, I conceive, that is not necessary; it will be sufficient if there is an injury arising to the belligerent from the employment in which the vessel is found. In the case of the Swedish vessel there was no *mens rea* in the owner, or in any other person acting under his authority. The master was an involuntary agent, acting under compulsion, put upon him by the officers of the French Government, and, so far as intention alone is considered, perfectly innocent. In the same manner in cases of *bona fide* ignorance, there may be no actual delinquency, but if the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done, or at least repeated, by enforcing the penalty of confiscation. If imposition has been practiced,

it operates as force; and if redress in the way of indemnification is to be sought against any person, it must be against those, who have, by means either of compulsion or deceit, exposed the property to danger. If, therefore, it was the most innocent case on the part of the master, if there was nothing whatever to affect him with privity, the whole amount of this argument would be, that he must seek *his* redress against the freighter; otherwise such opportunities of conveyance would be constantly used, and it would be almost impossible in the greater number of cases to prove the knowledge, and privity, of the immediate offender.

It has been argued throughout, as if the ignorance of the master alone would be sufficient to exempt the property of the owner from confiscation. But may there not be other persons, besides the master, whose knowledge and privity would carry with it the same consequences? Suppose the owner himself had knowledge of the engagement, would not that produce the *mens rea,* if such a thing is necessary? or if those who had been employed to act for the owner, had thought fit to engage the ship in a service of this nature, keeping the master in profound ignorance, would it not be just as effectual, if the *mens rea* is necessary, that it should reside in those persons, as in the owner? The observations which I shall have occasion to make on the remaining parts of this case will, perhaps, appear to justify such a supposition, either that the owner himself, or those who acted for him in Lisbon or in Holland, were connusant of the nature of the whole transaction. But I will first state *distinctly,* that the principle on which I determine this case is, that the carrying military persons to the colony of an enemy, who are there to take on them the exercise of their military functions, will lead to condemnation, and that the Court is not to scan with minute arithmetic the number of persons that are so carried. If it has appeared to be of sufficient importance to the Government of the enemy to send them, it must be enough to put the adverse Government on the exercise of their right of prevention; and the ignorance of the master can afford no ground of exculpation in favour of the owner, who must seek his remedy in cases of deception, as well as of force, against those who have imposed upon him. . . . I have no hesitation in pronouncing that this vessel is liable to be considered as a transport, let out in the service of the Government of Holland, and that it is as such subject to condemnation.

NOTE.—Accord: The Friendship (1807), 6 C. Robinson, 420; The Manouba (1913), Scott, *The Hague Court Reports,* 341. A vessel under charter of the enemy for the carriage of belligerent persons may be con-

demned even though at the time of seizure no such persons are on board, The Carolina (1802), 4 C. Robinson, 256. For unfavorable criticism of this case see Hall, 677*n.*, and Westlake, II, 302.

THE ATALANTA.

HIGH COURT OF ADMIRALTY OF GREAT BRITAIN. 1808.
6 C. Robinson, 440.

This was a case of a Bremen ship and cargo, captured on a voyage from Batavia to Bremen, on the 14th of July, 1807, having come last from the Isle of France; where a packet, containing dispatches from the Government of the Isle of France to the Minister of Marine, at Paris, was taken on board by the master, and one of the supercargoes, and was afterwards found concealed, in the possession of the second supercargo, under circumstances detailed in the judgment.

Sir W. SCOTT [LORD STOWELL]. . . . I feel myself bound to pronounce, that there were papers received on board, as public dispatches, and knowingly by those who are the agents of the proprietors; . . . and that the fact of a fraudulent concealment and suppression is most satisfactorily demonstrated.

The question then is, what are the legal consequences attaching on such a criminal act? for that it is criminal and most noxious is scarcely denied. What might be the consequences of a simple transmission of dispatches, I am not called upon by the necessities of the present case to decide, because I have already pronounced this to be a *fraudulent* case. That the simple carrying of dispatches, between the colonies and the mother country of the enemy, is a service highly injurious to the other Belligerent, is most obvious. In the present state of the world, in the hostilities of European powers, it is an object of great importance to preserve the connection between the mother country and her colonies; and to interrupt that connection, on the part of the other Belligerent, is one of the most energetic operations of war. The importance of keeping up that connection, for the concentration of troops, and for various military purposes, is manifest; and I may add, for the supply of civil assistance also, and support, because the infliction of civil distress, for the purpose of compelling a surrender, forms no inconsiderable part of the operations of war. It is not to be argued, therefore, that the importance of these dispatches might relate only to the civil wants

of the colony, and that it is necessary to shew a military tendency; because the object of compelling a surrender being a measure of war, whatever is conducive to that event must also be considered, in the contemplation of law, as an object of hostility, although not produced by operations strictly military. How is this intercourse with the mother country kept up, in time of peace? by ships of war, or by packets in the service of the state. If a war intervenes, and the other Belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does, in fact, place himself in the service of the enemy-state, and is justly to be considered in that character. Nor let it be supposed, that it is an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed. The carrying of two or three cargoes of stores is necessarily an assistance of a limited nature; but in the transmission of dispatches may be conveyed the entire plan of a campaign, that may defeat all the projects of the other Belligerent in that quarter of the world. It is true, as it has been said, that one ball might take off a Charles the XIIth, and might produce the most disastrous effects in a campaign; but that is a consequence so remote and accidental, that in the contemplation of human events, it is a sort of evanescent quantity of which no account is taken; and the practice has been accordingly, that it is in considerable quantities only that the offence of contraband is contemplated. The case of dispatches is very different; it is impossible to limit a letter to so small a size, as not to be capable of producing the most important consequences in the operations of the enemy: It is a service therefore which, in whatever degree it exists, can only be considered in one character, as an act of the most noxious and hostile nature. . . . I have the direct authority of the Superior Court for pronouncing that the carrying of dispatches of the enemy brings on the confiscation of the vehicle so employed.

It is said, that this is more than is done even in cases of contraband; and it is true, with respect to the very lenient practice of this country, which, in this matter recedes very much from the correct principle of the law of nations, which authorizes the penalty of confiscation. . . . This Country, which, however much its practice may be misrepresented by foreign writers, and sometimes by our own, has always administered the law of nations with lenity, adopts a more indulgent rule, inflicting on the ship only a forfeiture of freight in ordinary cases of contra-

band. But the offence of carrying dispatches is, it has been observed, greater. To talk of the confiscation of the noxious article, the dispatches, which constitutes the penalty in contraband, would be ridiculous. There would be no freight dependent on it, and therefore the same precise penalty cannot, in the nature of things, be applied. It becomes absolutely necessary, as well as just, to resort to some other measure of confiscation, which can be no other than that of the vehicle.

Then comes the other question, whether the penalty is not also to be extended further, to the cargo, being the property of the same proprietors—not merely *ob continentiam delicti,* but likewise because the representatives of the owners of the cargo, are directly involved in the knowledge and conduct of this guilty transaction? On the circumstances of the present case I have to observe, that the offence is as much the act of those who are the constituted agents of the cargo, as of the master, who is the agent of the ship. The general rule of law is, that where a party has been guilty of an interposition in the war, and is taken *in delicto,* he is not entitled to the aid of the Court, to obtain the restitution of any part of his property involved in the same transaction. It is said, that the term "interposition in the war" is a very general term and not to be loosely applied. I am of opinion, that this is an aggravated case of active interposition in the service of the enemy, concerted and continued in fraud and marked with every species of malignant conduct. In such a case I feel myself bound, not only by the general rule, *ob continentiam delicti,* but by the direct participation of guilt in the agents of the cargo. Their own immediate conduct not only excludes all favourable distinction, but makes them pre-eminently the object of just punishment. The conclusion therefore is, that I must pronounce the ship and cargo subject to condemnation. . . .

NOTE.—A neutral vessel carrying prisoners without the consent of both belligerents is treated as a commissioned cartel ship trading with or serving one of the belligerents in violation of the duty which it owes to the other, The Brig Betsey (1913), 49 Ct. Cl. 125. The fact that the unneutral service was rendered in ignorance of the existence of war does not excuse an offender who is brought before a prize court of his own country, The Zambesi (New South Wales, 1914), 1 Br. & Col. P. C. 358. If a vessel which is engaged in an unlawful voyage is captured while rendering unneutral service a plea of duress or compulsion will not be accepted, The Catherina Maria (1809), Edwards, 337, The Seyerstadt (1813), 1 Dodson, 241; but a vessel engaged in a lawful voyage which is compelled by *force majeure* to render unneutral service is innocent of wrong, The Pontoporos

(Singapore, 1915), 1 Br. & Col. P. C. 371. For further discussion of unneutral service see The Emanuel (1799), 1 C. Robinson, 296; The Rosalie and Betty (1800), 2 Ib. 343; The Carolina (1802), 4 Ib. 256; The Friendship (1807), 6 Ib. 420; The Rapid (1810), Edwards, 228; The Nigretia (1905), Takahashi, 639; The Industrie (1905), Ib. 732; The Quang-nam (1906), Ib. 735; The Proton (Egypt, 1916), 2 Br. & Col. P. C. 107. See also *Int. Law Sit. 1901*, 86; Ib. *1902*, 7; *Int. Law Topics, 1905*, 171; Ib. *1906*, 88; Cobbett, *Cases and Opinions*, II, 447; Moore, *Digest*, VII, 752.

Section 6. Exemptions from Capture.

THE PAQUETE HABANA.
THE LOLA.

Supreme Court of the United States. 1900.
175 U. S. 677.

Appeals from the District Court of the United States for the Southern District of Florida.

[The Paquete Habana and the Lola, fishing smacks belonging to Spanish subjects resident in Cuba, on returning to Havana from a fishing expedition, were captured by the American blockading squadron, taken to Key West, libelled, condemned, and sold. From the decree of condemnation this appeal was taken on the ground that such vessels are by law exempt from seizure.]

Mr. Justice Gray delivered the opinion of the Court. . . .

By an ancient usage among civilized nations, beginning centuries ago and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish have been recognized as exempt, with their cargoes and crews, from capture as prize of war.

This doctrine, however, has been correctly contested at the bar; and no complete collection of the instances illustrating it is to be found, so far as we are aware, in a single published work. . . . It is therefore worth the while to trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment in our own country and generally throughout the civilized world. . . . .

[Here follows an elaborate review of the authorities.]

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present

day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast-fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.

Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals, or cod or other fish, which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.

This rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

Calvo, in a passage already quoted, distinctly affirms that the exemption of coast-fishing vessels from capture is perfectly justiciable, or, in other words, of judicial jurisdiction or cognizance. Calvo, § 2368. Nor are judicial precedents wanting in support of the view that this exemption, or a somewhat analogous one, should be recognized and declared by a prize court.

By the practice of all civilized nations, vessels employed only for the purposes of discovery or science are considered as exempt from the contingencies of war, and therefore not subject to capture. It has been usual for the government sending out such an expedition to give notice to other powers; but it is not essential. 1 Kent Com. 91, note; Halleck, c. 20, § 22; Calvo, § 2376; Hall, § 138.

In 1813, while the United States were at war with England, an American vessel, on her voyage from Italy to the United States, was captured by an English ship, and brought into Halifax in Nova Scotia, and with her cargo condemned as lawful prize by the Court of Vice Admiralty there. But a petition for the restitution of a case of paintings and engravings which had been presented to and were owned by the Academy of Arts in Philadelphia, was granted by Dr. Croke, the judge of that Court,

who said: "The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted, amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favor and protection. They are considered not as the *peculium* of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species." And he added that there had been "innumerable cases of the mutual exercise of this courtesy between nations in former wars." The Marquis de Somerueles, Stewart Adm. (Nova Scotia), 445, 482.

In 1861, during the War of the Rebellion, a similar decision was made, in the District Court of the United States for the Eastern District of Pennsylvania, in regard to two cases of books belonging to and consigned to a university in North Carolina. Judge Cadwalader, in ordering these books to be liberated from the custody of the marshal, and restored to the agent of the university, said: "Though this claimant, as the resident of a hostile district, would not be entitled to restitution of the subject of a commercial adventure in books, the purpose of the shipment in question gives to it a different character. The United States, in prosecuting hostilities for the restoration of their constitutional authority, are compelled incidentally to confiscate property captured at sea, of which the proceeds would otherwise increase the wealth of that district. But the United States are not at war with literature in that part of their territory." He then referred to the decision in Nova Scotia, and to the French decisions upon cases of fishing vessels, as precedents for the decree which he was about to pronounce; and he added that, without any such precedents, he should have had no difficulty in liberating these books. The Amelia, 4 Philadelphia, 417. . . .

Ordered, that the decree of the District Court be reversed. . . .

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan and Mr. Justice McKenna, dissenting. . . .

Note.—As to the exemption of fishing vessels from capture in time of war see the Prize Regulations of Japan, art. 35; United States Naval War Code, art. 14; The Michael (1905), Russian and Japanese Prize Cases, II, 80; The Alexander (1905), Ib. II, 86. For early English practice see The Young Jacob and Johanna (1798), 1 C. Robinson, 20, and The Liesbet van den Toll (1804), 5 C. Robinson, 283. For the present English practice see

The Berlin (1914), Law Reports [1914] P. 265. See also Hall, *International Law*, 6th ed., 446; Westlake, *International Law*, II, 133; Holtzendorff, *Handbuch des Völkerrechts*, IV, 585; Holland, *Prize Law*, § 36; Oppenheim, *International Law*, II, 234; Halleck, *International Law*, 4th ed., II, 124.

As to other exemptions from capture see The Daifjie (1800), 3 C. Robinson, 139; La Gloire (1804), 5 Ib. 198; The Carolina (1807), 6 Ib. 336 (cartel ships); The Aryol (1905), Takahashi, 620; The Ophelia (1915), L. R. [1915] P. 129 (hospital ships); The Paklat (Hong-Kong, 1915), 1 Br. & Col. P. C. 515 (philanthropic mission). A ship forfeits its exemption if it performs any service of a military nature or fails to act in good faith, La Rosine (1800), 2 C. Robinson, 372; The Venus (1803), 4 Ib. 355. See Latifi, *Effects of War on Property*, ch. iv; Moore, *Digest*, VII, 434.

Section 7. Prize Courts.

THE FLAD OYEN.

High Court of Admiralty of Great Britain. 1799.
1 C. Robinson, 135.

[The Flad Oyen, an English ship, was captured by a French privateer and taken to the neutral port of Bergen, Norway, where the French consul held a pretended prize court and ordered the vessel sold. On a voyage from Bergen to St. Martins she was captured by the British, and is now claimed by her purchaser at the sale ordered by the French consul. In the first part of his opinion the learned judge discusses the *bona fides* of the sale and finds it colorable.]

Sir W. Scott [Lord Stowell]. . . . But another question has arisen in this case, upon which a great deal of argument has been employed; namely, Whether the sentence of condemnation which was pronounced by the French consul, is of such legal authority as to transfer the vessel, supposing the purchase to have been *bona fide* made? I directed the counsel for the claimants to begin; because, the sentence being of a species altogether new, it lay upon them to prove that it was nevertheless a legal one.

It has frequently been said, that it is the peculiar doctrine of the law of England to require a sentence of condemnation, as necessary to transfer the property of prize; and that according to the practice of some nations twenty-four hours, and according to the practice of others bringing *infra presidia*, is authority enough to convert the prize. I take that to be not quite correct; for I apprehend, that by the general practice of

the law of nations, a sentence of condemnation is at present deemed generally necessary; and that a neutral purchaser in Europe, during war, does look to the legal sentence of condemnation as one of the title-deeds of the ship, if he buys a prize vessel. I believe there is no instance in which a man having purchased a prize vessel of a belligerent, has thought himself quite secure in making that purchase, merely because the ship had been in the enemy's possession twenty-four hours, or carried *infra presidia:* the contrary has been more generally held, and the instrument of condemnation is amongst those documents which are most universally produced by a neutral purchaser; that if she has been taken as prize, it should appear also that she has been, in a proper judicial form, subjected to adjudication.

Now, in what form have these adjudications constantly appeared? They are the sentences of courts acting and exercising their functions in the belligerent country; and it is for the very first time in the world, that, in the year 1799, an attempt is made to impose upon the court a sentence of a tribunal not existing in the belligerent country, but of a person pretending to be authorized within the dominions of a neutral country: in my opinion, if it could be shewn, that, regarding mere speculative general principles, such a condemnation ought to be deemed sufficient; that would not be enough; more must be proved; it must be shewn that it is conformable to the usage and practice of nations.

A great part of the law of nations stands on no other foundation: it is introduced, indeed, by general principles; but it travels with those general principles only to a certain extent: and, if it stops there, you are not at liberty to go farther, and to say, that mere general speculations would bear you out in a further progress: thus, for instance, on mere general principles it is lawful to destroy your enemy; and mere general principles make no great difference as to the manner by which this is to be effected; but the conventional law of mankind, which is evidenced in their practice, does make a distinction, and allows some, and prohibits other modes of destruction; and a belligerent is bound to confine himself to those modes which the common practice of mankind has employed, and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purposes.

Now, it having been the constant usage, that the tribunals of the law of nations in these matters shall exercise their functions

within the belligerent country; if it was proved to me in the clearest manner, that on mere general theory such a tribunal might act in the neutral country; I must take my stand on the ancient and universal practice of mankind; and say that as far as that practice has gone, I am willing to go; and where it has thought proper to stop, there I must stop likewise.

It is my duty not to admit, that because one nation has thought proper to depart from the common usage of the world, and to meet the notice of mankind in a new and unprecedented manner, that I am on that account under the necessity of acknowledging the efficacy of such a novel institution; merely because general theory might give it a degree of countenance, independent of all practice from the earliest history of mankind. The institution must conform to the text law, and likewise to the constant usage upon the matter; and when I am told, that before the present war, no sentence of this kind has ever been produced in the annals of mankind; and that it is produced by one nation only in this war; I require nothing more to satisfy me, that it is the duty of this Court to reject such a sentence as inadmissible.

Having thus declared that there must be an antecedent usage upon the subject, I should think myself justified in dismissing this matter without entering into any farther discussion. But even if we look farther, I see no sufficient ground to say, that on mere general principles such a sentence could be sustained: proceedings upon prize are proceedings *in rem;* and it is presumed, that the body and substance of the thing, is in the country which has to exercise the jurisdiction. I have not heard any instances quoted to the contrary, excepting in a very few cases which have been urged, argumentatively, in the way which is technically called *ad hominem,* being cases of condemnations of British prizes carried into the ports of Lisbon and Leghorn: but in those the condemnations were pronounced by the High Court of Admiralty in England. The only cases are of two ships carried into foreign ports, and condemned in England by this Court; the very infrequency of such a practice shews the irregularity of it. Upon cases in the practice of other nations antecedent to the present war, the advocates have been silent.

Now, as to these condemnations of prizes carried to Lisbon and Leghorn, it has been said, that if the courts of Great Britain venture this degree of irregularity, other countries have a right to go farther. That consequence I deny: the true mode of correcting the irregular practice of a nation is, by protesting against

it; and by inducing that country to reform it: it is monstrous to suppose, that because one country has been guilty of an irregularity, every other country is let loose from the law of nations; and is at liberty to assume as much as it thinks fit.

Upon these ports of Lisbon and Leghorn it is to be remarked, that they have a peculiar and discriminate character, a character that to a certain degree assimilates them to British ports: the British exist there in a distinct character, under the protection of peculiar treaties; and with respect to Portugal, those treaties go so far as to engage, that if a ship belonging to one country shall be brought by its enemy into the ports of another, which happens to be at peace, this neutral country shall be bound to seize that ship, and restore it to its ally: to be sure no covenant can have more the effect of giving the ports of England and Portugal a reciprocal relation of a very peculiar sort—to make the British ports Portugese ports, and the Portugese ports British ports to a certain degree. Now, unless I am given to understand, that peculiar treaties between France and Denmark have impressed such a distinctive character upon the port of Bergen, I cannot allow that it can be considered, on the mere footing of general neutrality, to be a French port, exactly in the same manner in which London may be considered as a Portugese port, or Lisbon as a British port.

But supposing this possible, still it would not follow that such condemnations could be pleaded as authorities in the present case; because, in the first place, the validity of such condemnations themselves may be the subject of reasonable doubt.—For it by no means appears that the enemy, or neutrals, who might have an interest in contesting them, have ever acknowledged their validity. Whoever purchases under such sentences must be content to purchase them subject to all the questions that may arise upon their sufficiency.

But, 2dly, Supposing that no doubts could be entertained respecting the sufficiency of such sentences; it by no means follows that the efficacy of the present sentence can be supported: there the tribunal is acting in the country to which it belongs, and with whose authority it is armed. Here a person, utterly naked of all authority except over the subjects of his own country, and possessing that merely by the indulgence of the country in which he resides, pretends to exercise a jurisdiction in a matter in which the subjects of many other States may be concerned. No such authority was ever conceded by any country to a foreign agent of any description residing within it: and least of all could

such an authority be conceded in the matter of prize of war—a matter over which a neutral country has no cognizance whatever, except in the single case of an infringement of its own territory; and in which such a concession of authority cannot be made without departing from the duties, and losing the benefits, of its neutral character.

Mark the consequences which must follow from such a pretended concession: observe in the present case how it would affect the neutral character of the ports in the north! If France can station a judge of the Admiralty at Bergen, and can station there its cruisers to carry in prizes for that judge to condemn; who can deny that to every purpose of hostile mischief against the commerce of England, Bergen will differ from Dunkirk, in no other respect than this, that it is a port of the enemy to a much greater extent of practical mischief. To make the ports of Norway the seats of the French tribunals of war, is to make the adjacent sea the theatre of French hostility.

It gives one belligerent the unfair advantage of a new station of war, which does not properly belong to him; and it gives to the other the unfair disadvantage of an active enemy in a quarter where no enemy would naturally be found. The coasts of Norway could no longer be approached by the British merchant with safety, and a suspension of commerce would soon be followed by a suspension of amity.

Wisely, therefore, did the American government defeat a similar attempt made on them [by the French minister Genêt], at an earlier period of the war: they knew that to permit such an exercise of the rights of war, within their cities, would be to make their coasts a station of hostility.

Whether the government of Denmark has shewn equal vigilance in observing, or equal indignation in repelling the attempt, is more than I am warranted to assert: but though the publicity of the transaction in the town of Bergen may subject the police of that place to some degree of observation, I see nothing in the papers which issue immediately from the royal authority that at all affects the government itself with the knowledge and approbation of the fact; and indeed it would be indecent to suppose that a country, standing upon the footing of ancient and friendly alliance to this country, could have given its sanction to a measure so full of hostility to its friend, and of possible inconvenience to itself: I must, therefore, deem the act of this French consul a licentious attempt to exercise the rights of war

within the bosom of a neutral country, where no such exercise has ever been authorized.

I am of opinion upon the whole, that this ship must be restored to the British owners upon the usual salvage. . . .

CUSHING, ADMINISTRATOR, v. THE UNITED STATES.

COURT OF CLAIMS OF THE UNITED STATES. 1886.
22 Ct. Cl. 1.

[This was a rehearing of the questions involved in Gray, Administrator v. The United States (1886), 21 Court of Claims, 340, for which see *ante* p. 198. In the course of the argument, counsel for the defendant requested the court to find *inter alia* the following conclusions of law:

"11. That claimants had no valid claim against France, for the reason, among others, that they did not exhaust their remedies in the French courts by appeal or action upon the bond and against the property of the captor. . . .

13. It is universally admitted that the decree of a prize court is conclusive against all the world as to all matters decided and within its jurisdiction. . . . "

Only so much of the opinion is here given as relates to these requests.]

DAVIS, J., delivered the opinion of the court: . . .

The jurisdictional act requires us to inquire into legal condemnations, and it is urged on behalf of the defendants that all condemnations by the French courts are final and conclusive upon this court if the French court had jurisdiction. Many citations are made in support of this contention, among them is the case of Baring and others v. The Royal Exchange Assurance Company (5 East., 99 *et seq.*), which may be taken as a fair illustration.

The American ship Rosanna, insured by the defendants, was captured and condemned by the French, whereupon the plaintiffs sued on the policy and recovered. Lord Ellenborough, Ch. J., interrupting the argument, said:

"Does not this [French] sentence of condemnation proceed sufficiently on the ground of infraction of treaty between America and France in the ship not having those documents with which in the judgment of the French court the American was bound by

treaty to be provided? I do not say that they have construed the treaty rightly; on the contrary, suppose them to have construed it ever so iniquitously; yet, having competent jurisdiction to construe the treaty, and having professed to do so, we [the court] are bound by that comity of nations which has always prevailed amongst civilized states to give credit to their adjudication when the same question arises here upon which the foreign court has decided. After arguing for hours, we must come to the same conclusion at last, that the French court has specifically condemned the vessel for an infraction of treaty which negatives the warranty of neutrality. Then, having distinctly adjudged the vessel to be good prize upon a ground within their jurisdiction, unless we deny their jurisdiction, we are bound to abide by that judgment. Whenever a case occurs of a condemnation by a foreign court on the ground of *ex parte* ordinances only, without drawing inferences from them to show an infraction of treaty between the nation of the captors and captured, and referring the judgment of the court to the breach of treaty, I shall be glad to hear the case argued, whether such ordinances are to be considered as furnishing rules of presumption only against the neutrality or as positive laws in themselves, binding other nations *proprio vigore.*"

The decision of the English court, then, goes to this extent, that in an action between individuals the decree of the French court which had jurisdiction is final; so would it also be final as to the vessel, and the purchaser at the confiscation sale could rest upon the decree as good title against all the world.

But all this does not affect the position of the United States Government against the government of France.

Lord Ellenborough says that no matter how iniquitous the construction given the treaty by the French court, he, as a judge, is bound to follow it. But so is not the Government of the United States. That Government could have objected that either the court was corrupt, or that there existed no treaty, or that there had been manifest error in construing it. All such questions may be outside the right of a court to consider, but they are within the right and form part of the duty of the political branch of the Government. If the French court, acting within its jurisdiction, construed the treaty iniquitously, the courts might not have power to remedy the wrong, but the owner had a right to appeal to his Government for redress, and that Government, when convinced of the justice of his complaint, was bound to endeavor to redress it.

The decree is an estoppel on the courts, but it is no estoppel on the Government; in fact, the right to diplomatic interference arises only after the decree is rendered. Of course, precedents for cases of this kind are not to be found in the reports of courts, for no such case can, in the nature of things, come before a court unless by virtue of a special and peculiar statute, such as that under which we now act; but diplomatic history is full of them.

Rutherford (Institutes, vol. 2, ch. 9, p. 19), speaking of the right of a state to proceed in prize, says:

"This right of the state to which the captors belong to judge exclusively is not a complete jurisdiction. The captors, who are its own members, are bound to submit to its sentence, though this sentence should happen to be erroneous, because it has a complete jurisdiction over their persons. But the other parties in the controversy, as they are members of another state, are only bound to submit to its sentence as far as this sentence is agreeable to the law of nations, or to particular treaties, because it has no jurisdiction over them in respect either of their persons or of the things that are the subject of the controversy. If justice, therefore, is not done them, they may apply to their own state for a remedy; which may, consistently with the law of nations give them a remedy either by solemn war or by reprisals. (See Dana's Wheaton, 391.)"

This brings us naturally to another point, admitted as a general principle, that appeal should be prosecuted to the court of last resort before there can be diplomatic intervention.

The exceedingly able British-American Commission which sat in Washington in 1872 not only unanimously decided that they had jurisdiction in prize cases in which the decision of the ultimate appellate tribunal of the United States had been had, a conclusion in which even the agent of the United States concurred, but also that they had jurisdiction when the claimant had not pursued his remedy to the court of last resort, provided satisfactory reasons were given for the failure to appeal. (Papers relating to the Treaty of Washington, vol. 6, pp. 88-90.) To this last conclusion the American Commissioner dissented; but even he held that a misfeasance or default of the capturing Government, by which means an appeal was prevented, was sufficient to excuse the failure to appeal. (Id., 92.)

The rights of the prize courts are the rights of the capturing state. These courts are its agents, deputed by it to examine into the conduct of its own subjects before becoming answerable for what they have done, and the right ends when their conduct has

been thoroughly examined. Therefore the state has a right to require that the captor's acts be examined in all the ways which it has appointed for this purpose, and on this principle is founded the doctrine that the complainant, unless he exhaust his appeal, shall be held to confess the justice of the decision. This pre-supposes, first, that there are appellate courts; second, that they are open to the complainant freely and honestly. The captor has no right to insist for his own protection upon the fulfilment of a form which he by his own acts prevents.

There is also a distinction, not often clearly drawn, between the validity of a claim *per se* and the right to enforcement. The justice of the claim is founded upon the injustice of the sentence. The appeal does not affect the merits of the claim; it does not palliate or destroy any wrong done; but it is simply a course provided for the captor's protection, that he may fully examine into the acts of his own agents, through his other agents, the courts.

"The whole proceeding, from the capture to the condemnation, is a compulsory proceeding *in invitum* by the state in its political capacity, in the exercise of war powers, for which it is responsible, as a body politic, to the state of which the owner of the property is a citizen." (Dana's Wheaton, note 186.)

Therefore the capturing state may waive such demand, and not insist upon exhausting its right to further investigation, and may waive it by failing to provide an appellate tribunal, or by preventing recourse to it, or in any other way which shows an intention not to insist upon this right of examination; but appeal or no appeal, the validity of the claim is founded upon the injustice to the claimants.

All writers lay down the principle that appeal should be taken from the inferior to the superior tribunal before resort by the injured Government to measures of redress; but this principle is always coupled with the extreme measures of war and reprisals (see Rutherforth, *supra;* Grotius, bk. 3, ch. 2, §§ 4, 5), and there is no assertion in the writers that illegal capture necessarily does not found an international claim even when appeal has not been taken.

It was notorious that justice could not be obtained in the French prize tribunals in existence at the time of those seizures. . . . Consuls were at one time forbidden to appear before the tribunals in defense of absent owners. . . . The form and expense of appeal were useless, for it was not denied that the adjudications below were in accordance with French or-

dinances, while it was contended that they were in violation of the rights of neutrals, measured either by treaty provision or by the precepts of the law of nations. Municipal law is not a measure of international responsibility, but it is binding within the jurisdiction of the state upon all its subordinate agents, including the courts. The decree in one of the cases before us, which was appealed to the civil tribunal, shows . . . that questions of treaty or international law were not ruled upon, the court being guided alone by the statutes of France. In the face of precedents of this kind an appeal was a vain and expensive form, as an affirmation of the judgment below necessarily must follow.

It is important to note that during the period of these seizures neither the Government of the United States, which consistently supported the claimants' contentions, nor the Government of France, from whom we were demanding redress, indicated the necessity of the form of appeal, nor later did the French, even in the long negotiations in which the validity of these claims was a principal subject of discussion, intimate in any way that they considered the appeal of importance or that they required it.

We conclude, therefore, that under these exceptional circumstances a claim properly founded in law is not excluded from our jurisdiction because the supposed remedy by appeal was not exhausted, and this we hold upon two principal grounds: First that by the action of the French Government such an appeal was useless or impracticable; second, that as between the United States and France such an appeal as a condition precedent to recovery was in effect waived. . . .

THE ZAMORA.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1916.
Law Reports [1916] 2 A. C. 77.

On appeal from the High Court of Justice, Probate, Divorce and Admiralty Division, in Prize.

LORD PARKER OF WADDINGTON. On April 8, 1915, the Zamora, a Swedish steamship bound from New York to Stockholm with a cargo of grain and copper, was stopped by one of His Majesty's cruisers between the Faroe and Shetland Islands and taken for

purposes of search first to the Orkney Islands and then to Barrow-in-Furness. She was seized as prize in the latter port on April 19, 1915, and in due course placed in the custody of the marshal of the Prize Court. . . . On May 14, 1915, a writ was issued by His Majesty's Procurator-General claiming confiscation of both vessel and cargo, and on June 14, 1915, the President [of the Prize Court], at the instance of the Procurator-General, made an order under Order XXIX., r. 1, of the Prize Court Rules giving leave to the War Department to requisition the copper, but subject to an undertaking being given in accordance with the provisions of Order XXIX., r. 5. This appeal is from the President's order of June 14, 1915.[1] . . .

The Prize Court Rules derive their force from Orders of His Majesty in Council. These Orders are expressed to be made under the powers vested in His Majesty by virtue of the Prize Court Act, 1894 [57 & 58 Vict. c. 39], *or otherwise*. The Act of 1894 confers on the King in Council power to make rules as to the procedure and practice of the Prize Courts. So far, therefore, as the Prize Court Rules relate to procedure and practice they have statutory force and are, undoubtedly, binding. But Order XXIX., r. 1, construed as an imperative direction to the judge is not merely a rule of procedure or practice. . . . If, therefore, Order XXIX., rule 1, construed as an imperative direction be binding, it must be by virtue of some power vested in the King in Council otherwise than by virtue of the Act of 1894. It was contended by the Attorney-General that the King in Council has such a power by virtue of the Royal prerogative, and their Lordships will proceed to consider this contention.

The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution. It is true that, under

[1] The provisions of the Orders in Council essential to the decision of this case are as follows:

Order I . . . "2 . . . The term 'ship' when used in these Rules shall also mean 'goods' and 'freight.'"

Order XXIX [as amended by Order of Council of April 29, 1915]:

"1. Where it is made to appear to the Judge on the application of the proper Officers of the Crown that it is desired to requisition on behalf of His Majesty a Ship in respect of which no final decree of condemnation has been made, he shall order that the Ship shall be appraised, and that upon an undertaking being given in accordance with Rule 5 of this Order [providing for payment for ship or goods taken] the Ship shall be released and delivered to the Crown."—Ed.

a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity. It is, however, suggested that the manner in which Prize Courts in this country are appointed and the nature of their jurisdiction differentiate them in this respect from other Courts.

Prior to the Naval Prize Act, 1864 [27 & 28 Vict. c. 25], jurisdiction in matters of prize was exercised by the High Court of Admiralty, by virtue of a commission issued by the Crown under the Great Seal at the commencement of each war. The commission no doubt owed its validity to the prerogative, but it cannot on that account be properly inferred that the prerogative extended to prescribing or altering the law to be administered from time to time under the jurisdiction thereby conferred. The Courts of Common Law and Equity in like manner originated in an exercise of the prerogative. The form of commission conferring jurisdiction in prize on the Court of Admiralty was always substantially the same. Their Lordships will take that quoted by Lord Mansfield in Lindo v. Rodney (1782), 2 Doug. 612, n., 614, n., as an example. It required and authorized the Court of Admiralty "to proceed upon all and all manner of captures, seizures, prizes, and reprisals, of all ships and goods, that are, or shall be, taken; and to hear and determine, according to the course of the Admiralty, and the law of nations." If these words be considered, there appear to be two points requiring notice, and each of them, so far from suggesting any reason why the prerogative should extend to prescribing or altering the law to be administered by a Court of Prize, suggests strong grounds why it should not.

In the first place, all those matters upon which the Court is authorized to proceed are, or arise out of, acts done by the sovereign power in right of war. It follows that the King must, directly or indirectly, be a party to all proceedings in a Court of Prize. In such a Court his position is in fact the same as in the ordinary Courts of the realm upon a petition of right which has been duly fiated. Rights based on sovereignty are waived and the Crown for most purposes accepts the position of an ordinary litigant. A Prize Court must of course deal judicially with all questions which come before it for determination, and

it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.

In the second place, the law which the Prize Court is to administer is not the national or, as it is sometimes called, the municipal law, but the law of nations—in other words, international law. It is worth while dwelling for a moment on this distinction. Of course, the Prize Court is a municipal Court, and its decrees and orders owe their validity to municipal law. The law which it enforces may therefore, in one sense, be considered a branch of municipal law. Nevertheless, this distinction between municipal and international law is well defined. A Court which administers municipal law is bound by and gives effect to the law as laid down by the sovereign State which calls it into being. It need inquire only what that law is, but a Court which administers international law must ascertain and give effect to a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilized nations in their relations towards each other or in express international agreement. It is obvious that, if and so far as a Court of Prize in this country is bound by and gives effect to Orders of the King in Council purporting to prescribe or alter the international law, it is administering not international law but municipal law; for an exercise of the prerogative cannot impose legal obligation on any one outside the King's dominions who is not the King's subject. If an Order in Council were binding on the Prize Court, such Court might be compelled to act contrary to the express terms of the commission from which it derived its jurisdiction.

There is yet another consideration which points to the same conclusion. The acts of a belligerent Power in right of war are not justiciable in its own Courts unless such Power, as a matter of grace, submit to their jurisdiction. Still less are such acts justiciable in the Courts of any other Power. As is said by Story J. in the case of The Invincible [1814], 2 Gall. 28, 44, "the acts done under the authority of one Sovereign can never be subject to the revision of the tribunals of another Sovereign; and the parties to such acts are not responsible therefor in their private capacities." It follows that but for the existence of Courts of Prize no one aggrieved by the acts of a belligerent Power in times of war could obtain redress otherwise than through diplomatic channels and at the risk of disturbing international amity. An appropriate remedy is, however, provided by the fact that, according to international law, every belligerent Power must

appoint and submit to the jurisdiction of a Prize Court to which any person aggrieved by its acts has access, and which administers international as opposed to municipal law—a law which is theoretically the same, whether the Court which administers it is constituted under the municipal law of the belligerent Power or of the Sovereign of the person aggrieved, and is equally binding on both parties to the litigation. It has long been well settled by diplomatic usage that, in view of the remedy thus afforded, a neutral aggrieved by any act of a belligerent Power cognisable in a Court of Prize ought, before resorting to diplomatic intervention, to exhaust his remedies in the Prize Courts of the belligerent Power. A case for such intervention arises only if the decisions of those Courts are such as to amount to a gross miscarriage of justice. It is obvious, however, that the reason for this rule of diplomacy would entirely vanish if a Court of Prize, while nominally administering a law of international obligation, were in reality acting under the direction of the Executive of the belligerent Power.

It cannot, of course, be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by Acts of the Imperial Legislature. But it is none the less true that if the Imperial Legislature passed an Act the provisions of which were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court. Even if the provisions of the Act were merely declaratory of the international law, the authority of the Court as an interpreter of the law of nations would be thereby materially weakened, for no one could say whether its decisions were based on a due consideration of international obligations, or on the binding nature of the Act itself. The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the executive orders of the King in Council.

In connection with the foregoing considerations, their Lordships attach considerable importance to the Report dated January 18, 1753, of the Committee appointed by His Britannic Majesty to reply to the complaint of Frederick II. of Prussia as to certain captures of Prussian vessels made by British ships during the war with France and Spain, which broke out in 1744. By way of reprisals for these captures the Prussian King had suspended

the payment of interest on the Silesian Loan. The Report, which derives additional authority from the fact that it was signed by Mr. William Murray, then Solicitor-General, afterwards Lord Mansfield, contains a valuable statement as to the law administered by Courts of Prize. This is stated to be the law of nations, modified in some cases by particular treaties. "If," says the Report, "a subject of the King of Prussia is injured by, or has a demand upon any person here, he ought to apply to your Majesty's Courts of justice, which are equally open and indifferent to foreigner or native; so, vice versa, if a subject here is wronged by a person living in the dominions of His Prussian Majesty, he ought to apply for redress in the King of Prussia's Courts of justice. If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the jurisdictions established to try these questions. The law of nations, founded upon justice, equity, conscience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries directed or supported by the State, and justice absolutely denied *in re minime dubia* by all the tribunals, and afterwards by the Prince. Where the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions different men think and judge differently; and all a friend can desire is, that justice should be impartially administered to him, as it is to the subjects of that Prince in whose Courts the matter is tried." The Report further points out that in England "the Crown never interferes with the course of justice. No order or any intimation is ever given to any judge." It also contains the following statement: "All captures at sea, as prize, in time of war, must be judged of in a Court of Admiralty, according to the law of nations and particular treaties, where there are any. There never existed a case where a Court, judging according to the laws of England only, ever took cognizance of prize . . . it never was imagined that the property of a foreign subject, taken as prize on the high seas, could be affected by laws peculiar to England." See *Collectanea Juridica*, vol. 1, pp. 138, 147, 152. This Report is, in their Lordships' opinion, conclusive that in 1753 any notion of a Prize Court being bound by the executive orders of the Crown, or having to administer municipal as opposed to international law, was contrary to the best legal opinion of the day.

The Attorney-General was unable to cite any case in which

an Order of the King in Council had as to matters of law been held to be binding on a Court of Prize. He relied chiefly on the judgment of Lord Stowell in the case of The Fox [1811], Edw. 311; 2 Eng. P. C. 61. The actual decision in this case was to the effect that there was nothing inconsistent with the law of nations in certain Orders in Council made by way of reprisals for the Berlin and Milan Decrees, though if there had been no case for reprisals the Orders would not have been justified by international law. . . . The judgment of Lord Stowell contains, however, a remarkable passage quoted in full in the Court below, which refers to the King in Council possessing "legislative rights" over a Court of Prize analogous to those possessed by Parliament over the Courts of common law. At most this amounts to a dictum, and in their Lordships' opinion, with all due respect to so great an authority, the dictum is erroneous. It is, in fact, quite irreconcilable with the principles enunciated by Lord Stowell himself. . . . [The learned judge here quotes from The Maria, 1 C. Robinson, 340, 350.]

There are two further points requiring notice in this part of the case. The first arises on the argument addressed to the Board by the Solicitor-General. It may be, he said, that the Court would not be bound by an Order in Council which is manifestly contrary to the established rules of international law, but there are regions in which such law is imperfectly ascertained and defined; and, when this is so, it would not be unreasonable to hold that the Court should subordinate its own opinion to the directions of the Executive. This argument is open to the same objection as the argument of the Attorney-General. If the Court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot, even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is, according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfill its functions as a Prize Court and justify the confidence which other nations have hitherto placed in its decisions.

The second point requiring notice is this. It does not follow that, because Orders in Council cannot prescribe or alter the law to be administered by the Prize Court, such Court will ignore them entirely. On the contrary, it will act on them in every case in which they amount to a mitigation of the Crown rights in favour of the enemy or neutral, as the case may be. . . . Further, the Prize Court will take judicial notice of every Order

in Council material to the consideration of matters with which it has to deal, and will give the utmost weight and importance to every such Order short of treating it as an authoritative and binding declaration of law. . . . Further, it cannot be assumed, until there be a decision of the Prize Court to that effect, that any executive order is contrary to law, and all such orders, if acquiesced in and not declared to be illegal, will, in course of time, be themselves evidence by which international law and usage may be established. . . .

On this part of the case, therefore, their Lordships hold that Order XXIX., r. 1, of the Prize Court Rules, construed as an imperative direction to the Court, is not binding. . . . Their Lordships will humbly advise His Majesty accordingly. . . .

NOTE.—In Great Britain the Admiralty Division of the High Court of Justice is vested with jurisdiction over all matters of prize arising on the high seas, or in any part of the British dominions or in any place where the Crown has jurisdiction. No special commission is required, but such a commission was issued in 1914. In the British possessions, prize jurisdiction is vested either in the Colonial Courts of Admiralty or in a Vice-Admiralty Court. Such jurisdiction is not inherent but is derived from a special commission of the Crown or warrant of the Admiralty authorizing the court to act as a prize court. An appeal lies from all the prize courts to the Judicial Committee of the Privy Council. For an interesting account of British prize jurisdiction see the address of the Attorney General at the opening session of the present British Prize Court on September 4, 1914, best reported in 1 *British and Colonial Prize Cases*, 2.

In the United States, prize jurisdiction is vested in the District Courts without special commission. An appeal lies to the Supreme Court. The court of that district into which the captured property is first taken has jurisdiction without regard to the place of capture, The Prize Cases (1863), 2 Black, 635. In both Great Britain and the United States the prize courts are true judicial tribunals and are always composed of judges. In other countries the court is often composed in whole or in part of administrative officials without judicial training. In Germany only two of the five judges are lawyers. The Russian prize courts are largely composed of naval officers. One of the most important conventions adopted at The Hague in 1907 provided for the establishment of an international prize court to which an appeal would lie from the municipal prize courts. It was to provide a code of maritime law for the use of the proposed court that the Naval Conference was assembled in 1908-1909 which prepared the Declaration of London. On the international prize court and the Declaration of London see Bentwich, *The Declaration of London;* Hershey, *Essentials*, 524; Higgins, *The Hague Peace Conferences*, ch. xii; Holland, *War and Neutrality*, 150; Hull, *The Two Hague Conferences*, 427; *Int. Law Topics, 1909;* Ib., *1915*, 93; Scott, *The Hague Peace Conferences of 1899 and 1907*, I, ch. x, C. N. Gregory, "The Proposed International Prize Court and Some of its Difficulties," *Am. Jour. Int. Law*, II, 458; H. B. Brown, "The Proposed International Prize Court," Ib. II, 476; C. H. Stockton,

"The International Naval Conference of London, 1908-1909," Ib. III, 596; papers on the Declaration of London by Arthur Cohen, K. C., Sir John Macdonnell and Dr. Thomas Baty in *Report of the 26th Conference of the International Law Association*, 67, 89, 115.

Prize, as defined by Lord Mersey, is the term applied to a ship or goods captured *jure belli* by the maritime force of a belligerent at sea or seized in port. Earl of Halsbury, *The Laws of England*, XXIII, 276. This definition, by one of the most eminent authorities on admiralty law, is not sufficiently comprehensive to include a number of decided cases. In The Roumanian (1914), L. R. [1915] P. 26, the British Prize Court held that a cargo of oil belonging to a German company which had been shipped before the outbreak of war on a British tank-steamer bound from Port Arthur, Texas, to Hamburgh, but diverted by the Admiralty to a British port where a part of it had been pumped into tanks on land and afterward seized as prize, was subject to maritime capture. "It came into the port," said Sir Samuel Evans, "as maritime merchandise of the enemy subject to seizure, and in my opinion the whole of it remained such, until it was actually formally seized on behalf of the Crown." And the learned President indicated that his decision would be the same whether the tanks were within the port or not. On appeal, the Privy Council, relying on Lord Mansfield's judgment in Lindo v. Rodney (1682), 2 Douglas, 613, affirmed the decision of President Evans, L. R. [1916] 1 A. C. 124, and said:

> The argument of counsel [for the appellants] was based on the assumption that no enemy goods not actually afloat at the time of seizure could be lawfully seized as prize, unless possibly they could be considered as locally situate within a port or harbor. . . . There is, in their Lordships' opinion, no ground for this assumption. The test of afloat or ashore is no infallible test as to whether goods can or cannot be lawfully seized as maritime prize. It is perfectly clear, for instance, that enemy goods seized on enemy territory by the naval forces of the Crown may lawfully be condemned as prize. The same is true of goods seized by persons holding letters of marque, and even of goods seized by persons having no authority whatever on behalf of the Crown, when the Crown subsequently ratifies the seizure. This is clear from the case of Brown and Burton v. Franklyn (1705), Carth. 474.

In an excellent discussion of the subject in Ten Bales of Silk at Port Said (Egypt, 1916), 2 Br. & Col. P. C. 247, President Cator formulated the governing principle in these words:

> In examining the cases and pondering upon the principles which determine whether goods are capable of being made prize or not, it has been borne in upon me that the determining factor is not whether the goods are referable to any particular ship, or whether they came into the country stamped with a hostile character, but whether, when the Crown lays its hands upon them, they are cargo or not cargo.

President Cator's principle of "cargo or not cargo" was applied in the Achaia (No. 2) (Egypt, 1915), 1 Br. & Col. P. C. 635, and the decision in The Eden Hall (1916), 2 Ib. 84, might also have been based upon it. In The Thalia (1905), Takahashi, 605, the Prize Court of Japan held that a Russian vessel which had been loaded upon another vessel and conveyed before the outbreak of war to a ship yard in Japan and placed on dry land for repairs was because of its nature a maritime prize subject to seizure and

condemnation. Naval stores captured at a naval station by a naval force and as a result of a naval engagement are subject of prize, The Manila Prize Cases (1903), 188 U. S. 254, but barges propelled by sweeps and polls, and non-seagoing floating derricks or wrecking boats are not, Ib. In the American Civil War captures made upon inland waters by the naval forces of the United States were by statute exempt from condemnation as maritime prize, The Cotton Plant (1871), 10 Wallace, 577.

The determination of questions of prize belongs exclusively to the country of the captor, L'Invincible (1816), 1 Wheaton, 238. The prize court of an ally has no jurisdiction, Glass v. Sloop Betsey (1794), 3 Dallas, 6, but a prize court in the territory of an ally may condemn, The Christopher (1799), 2 C. Robinson, 209. A belligerent may not set up a prize court in a neutral country, Wheelwright v. De Peyster (1806), 1 Johnson (N. Y.) 471, 481. There are exceptional cases in which a prize court sitting in a belligerent state has condemned a prize lying in a neutral port, The Henrick and Maria (1799), 4 C. Robinson, 43; Hudson v. Guestier (1808), 4 Cranch, 293; The Polka (1854), Spinks, 57; but in the opinion which he delivered in the last case the eminent judge Dr. Lushington said that "this case is decided upon its own peculiar circumstances, and is not to be considered as a precedent for the condemnation of a prize while lying in a neutral port." To ask a neutral to allow its ports to be used as places of deposit for captured vessels which cannot be taken to a port of the captor is to ask it to abandon its neutrality. The doctrine of the cases cited above is now generally condemned. It was embodied in article 23 of Convention XIII, adopted at The Hague in 1907, but this article was rejected by Great Britain, Japan, Siam and the United States.

The capture of a vessel or cargo does not transfer title. That can be effected only by a decree of a prize court of competent jurisdiction, The Nassau (1867), 4 Wallace, 634; Oakes v. United States (1899), 174 U. S. 778, 789; The Brig Fair Columbian (1913), 49 Ct. Cl. 133. Pending condemnation or restitution the captured property or its proceeds are held by the captor in trust for those who may finally be proved to be entitled to it, The Nassau (1867), 4 Wallace, 634, but a decree of condemnation relates back to the time of capture, Goss v. Withers (1758), 2 Burrow, 683; Stevens v. Bagwell (1808), 15 Ves. Jr. 139. As seizure is merely the assertion of a right to capture, it is the captor's duty to take his prize before a prize court as soon as possible. Unnecessary delay may result in a decree of demurrage by way of damages, The Corier Maritimo (1799), 1 C. Robinson, 287; The Peacock (1802), 4 Ib. 185; Slocum v. Mayberry (1817), 2 Wheaton, 1; The Nuestra Senora de Regla (1882), 108 U. S. 92. A delay of one month was held to be unreasonable in The St. Juan Baptista (1803), 5 C. Robinson, 33. A claimant also may lose his rights by undue delay, The Susanna (1805), 6 Ib. 48. While it is the duty of a captor to take in his prize for adjudication, he may under imperative circumstances sell it and submit the proceeds to the prize court, Jecker v. Montgomery (1852), 13 Howard, 498, 516. In The Erymanthos, Cargo Ex, (Malta, 1915), the court held that if enemy property consigned to a British, allied, or neutral subject under a contract by which title had passed to the buyer be captured before payment, payment is to be made to the Crown, on the theory that the goods when restored are put in their original condition as to the seller's lien, and the seller being an enemy, his rights pass to the

Crown. *Jour. Soc. Comp. Leg.*, XVI, (N. S.) 70. In extreme cases enemy vessels captured as prize may be destroyed, The Felicity (1819), 2 Dodson, 381, but if the vessel proves not to have been an enemy vessel, the captors must pay the full value of the property destroyed even though if brought before a prize court it would have been confiscated, The Actaeon (1815), 2 Dodson, 48. But recent regulations as to destruction of prizes issued by various governments do not distinguish between enemy and neutral vessels. See Wilson, *Handbook*, 306; *Int. Law. Topics, 1905*, 62; *Int. Law Situations, 1907*, 74; Ib., *1911*, 51; Atherley-Jones, 528; Barclay, *Problems*, 99; Lawrence, *War and Neutrality in the Far East*, 250; Garner in *Am. Jour. Int. Law*, IX, 594, X, 12; Smith and Sibley, *International Law*, ch. xii. Whenever a captor brings goods to the port of actual destination according to the intent of the contracting parties he is entitled to the freight because he has complied with the terms of the contract, but in any other case he is entitled to no freight at all, even though the vessel has performed a large part of its voyage. In The Vrow Henrica (1803), 4 C. Robinson, 343, Lord Stowell said, "Freight is, in all ordinary cases, a lien which is to take the place of all others. The captor takes *cum onere.*" See also The Der Mohr (1800), 3 C. Robinson, 129, (1802), 4 Ib. 315; The Fortuna (1802), 4 Ib. 278; The Vrow Anna Catherina (1806), 6 Ib. 269; The Antonia Johanna (1816), 1 Wheaton, 159; Hooper, Adm. v. United States (1887), 22 Ct. Cl. 408; The Roland (1915), 1 Br. & Col. P. C. 188. The title to all property captured vests in the state of the captor, The Manila Prize Cases (1903), 188 U. S. 254, and hence at any time prior to condemnation the state may order the property released to its former owner, The Elsebe (1804), 5 C. Robinson, 155; The St. Ivan (1811), Edwards, 376. But such release does not prevent the captor from proceeding to adjudication, The Mercurius (1798), 1 C. Robinson, 80. The sentence of condemnation by a prize court having jurisdiction completely extinguishes the title of the original proprietor and transfers title to the state or sovereign of the captor, The Brig Fair Columbian (1913), 49 Ct. Cl. 133. Since the judgment of a prize court is a proceeding *in rem* it is conclusive as to all matters decided and within its jurisdiction, and is a protection to all persons who derive their claims from the captor, Hudson v. Guestier (1810), 6 Cranch, 281; Cushing v. Laird (1882), 107 U. S. 69, but a decree may be made the basis of a diplomatic protest, Cushing v. United States (1886), 22 Ct. Cl. 1, 42, and the classic argument of William Pinckney in Moore, *Int. Arb.*, III, 3180. The following decisions in prize made by the United States Supreme Court during the Civil War were modified or reversed by the British-American Claims Commission appointed under the Treaty of Washington (the reference in parentheses is to Moore, *Int. Arb.*): The Hiawatha, 2 Black, 635 (IV, 3902); The Circassian, 2 Wallace, 135 (IV, 3911); The Springbok, 5 Wallace, 1 (IV, 3928); Sir William Peel, 5 Wallace, 517 (IV, 3935); The Volant, 5 Wallace, 179 (IV, 3950); The Science, 5 Wallace, 178 (IV, 3950). For further discussion of prize courts and prize law, see Earl of Halsbury, *Laws of England*, "Prize Law and Jurisdiction," XXIII, 275; Moore, *Digest*, VII, ch. xxv; Tiverton, *Principles and Practice of Prize Law;* J. A. Hall, *The Law of Naval Warfare*, ch. xi; Cobbett, *Cases and Opinions*, II, 188; Pyke, *The Law of Contraband of War*, 214; *Cyclopedia of Law and Procedure*, XL, 372.

CHAPTER XI.

BLOCKADE.

Section 1. General Rules.

THE BETSEY.

High Court of Admiralty of Great Britain. 1798.
1 C. Robinson, 93.

This was a case of a ship and cargo, taken by the English, at the capture of Guadaloupe, April the 13th, 1794; and retaken, together with that island, by the French, in June following. . . . The first seizure was defended on a suggestion, that The Betsey had broken the blockade at Guadaloupe.

Sir W. Scott [Lord Stowell]. . . . On the question of blockade three things must be proved: 1st, The existence of an actual blockade; 2dly, The knowledge of the party; and, 3dly, Some act of violation, either by going in, or by coming out with a cargo laden after the commencement of blockade. The time of shipment would on this last point be very material, for although it might be hard to refuse a neutral, liberty to retire with a cargo already laden, and by that act already become neutral property; yet, after the commencement of a blockade, a neutral cannot, I conceive, be allowed to interpose in any way to assist the exportation of the property of the enemy. After the commencement of the blockade, a neutral is no longer at liberty to make any purchase in that port.

It is necessary, however, that the evidence of a blockade should be clear and decisive: but in this case there is only an affidavit of one of the captors, and the account which is there given is, "that on the arrival of the British forces in the West Indies, a proclamation issued, inviting the inhabitants of Martinique, St. Lucie, and Guadaloupe, to put themselves under the protection of the English; that on a refusal, hostile operations were commenced

against them all:" but it cannot be meant that they began immediately against all at once; for it is notorious that they were directed against them separately and in succession. It is further stated, "that in January, 1794, (but without any more precise date,) Guadaloupe was summoned, and was then put into a state of complete investment and blockade."

The word *complete* is a word of great energy; and we might expect from it to find, that a number of vessels were stationed round the entrance of the port to cut off all communication: but from the protest I perceive, that the captors entertained but a very loose notion of the true nature of a blockade; for it is there stated, "that on the 1st of January, after a general proclamation to the French islands, they were put into a state of *complete* blockade." It is a term, therefore, which was applied to all those islands at the same time, under the first proclamation.

The Lords of Appeal have determined that such a proclamation was not in itself sufficient to constitute a legal blockade: it is clear, indeed, that it could not in reason be sufficient to produce the effect, which the captors erroneously ascribed to it: but from the misapplication of these phrases in one instance, I learn, that we must not give too much weight to the use of them on this occasion; and from the generality of these expressions, I think we must infer, that there was not that actual blockade, which the law is now distinctly understood to require.

But it is attempted to raise other inferences on this point, from the manner in which the master speaks of the difficulty and danger of entering; and from the declaration of the Municipality of Guadaloupe, which states "the island to have been in a state of siege." It is evident that the American master speaks only of the difficulty of avoiding the English cruisers generally in those seas; and as to the other phrase, it is a term of the new jargon of France, which is sometimes applied to domestic disturbances; and certainly is not so intelligible as to justify me in concluding, that the island was in that state of investment, from a foreign enemy, which we require to constitute blockade: I cannot, therefore, lay it down, that a blockade did exist, till the operations of the forces were actually directed against Guadaloupe in April.

It would be necessary for me, however, to go much farther, and to say that I am satisfied also that the parties had knowledge of it: but this is expressly denied by the master. He went in without obstruction. Mr. Incledon's statement of his belief of the notoriety of the blockade is not such evidence as will alone

be sufficient to convince me of it. With respect to the shipment of the cargo, it does not appear exactly under what circumstances or what time it was taken in: I shall therefore dismiss this part of the case. . . .

THE NEPTUNUS.

HIGH COURT OF ADMIRALTY OF GREAT BRITAIN. 1799.
2 C. Robinson, 110.

This was a case of a vessel sailing on a voyage from Dantzick to Havre, 26th October 1798, and taken in attempting to enter that port on 26th November. . . .

Sir WM. SCOTT [LORD STOWELL]. This is a case of a ship and cargo seized in the act of entering the port of Havre in pursuance of the original intention under which the voyage began. The notification of the blockade of that port was made on the 23d February 1798, and this transaction happened in November in that year; the effect of a notification to any foreign government would clearly be to include all the individuals of that nation; it would be the most nugatory thing in the world, if individuals were allowed to plead their ignorance of it; it is the duty of foreign governments to communicate the information to their subjects, whose interests they are bound to protect. I shall hold therefore that a neutral master can never be heard to aver against a notification of blockade, that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own government, and may raise a claim of compensation from them, but it can be no plea in the Court of a belligerent. In the case of a blockade *de facto* only, it may be otherwise, but this is the case of a blockade by notification; another distinction between a notified blockade and a blockade existing *de facto* only, is that in the former, the act of sailing to a blockaded place is sufficient to constitute the offence. It is to be presumed that the notification will be formally revoked, and that due notice will be given of it; till that is done, the port is to be considered as closed up, and from the moment of quitting port to sail on such a destination, the offence of violating the blockade is complete, and the property engaged in it subject to confiscation: it may be different in a blockade existing *de facto* only; there no presumption arises as to the continuance, and the ignorance of the party may be admitted as an excuse, for sailing on a doubt-

ful and provisional destination. But this is a case of a vessel from Dantzick after the notification, and the master cannot be heard to aver his ignorance of it. He sails:—till the moment of meeting Admiral Duncan's fleet, I should have no hesitation in saying, that, if he had been taken, he would have been taken *in delicto,* and have subjected his vessel to confiscation; but he meets Admiral Duncan's fleet, and is examined, and liberated by the captain of an English frigate belonging to that fleet, who told him that he might proceed on his destination, and who, on being asked, Whether Havre was under a blockade? said, "It was not blockaded," and wished him a good voyage. The question is, In what light he is to be considered after receiving this information? That it was *bona fide* given cannot be doubted, as they would otherwise have seized the vessel; the fleet must have been ignorant of the fact; and I have to lament that they were so: When a blockade is laid on, it ought by some kind of communication to be made known not only to foreign governments, but to the King's subjects, and particularly to the King's cruisers; not only to those stationed at the blockaded ports, but to others, and especially considerable fleets, that are stationed *in itinere,* to such a port from the different trading countries that may be supposed to have an intercourse with it. Perhaps it would have been safer in the English Captain to have answered, that he could not say anything of the situation at Havre; but the fact is, (and it has not been contradicted,) that the British officer told the master "that Havre was not blockaded." Under these circumstances I think, that after this information he is not taken *in delicto.* I do not mean to say that the fleet could give the man any authority to go to a blockaded port; it is not set up as an authority, but as intelligence affording a reasonable ground of belief; as it could not be supposed, that such a fleet as that was, would be ignorant of the fact.

From that time I consider that a state of innocence commences; the man was not only in ignorance, but had received positive information that Havre was not blockaded. Under these circumstances, I think it would be a little too hard to press the former offence against him; it would be to press a pretty strong principle rather too strongly; I think I cannot look retrospectively to the state in which he stood before the meeting with the British fleet, and therefore I shall direct this Vessel and Cargo to be restored.

THE FRANCISKA.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF GREAT BRITAIN. 1855.
10 Moore, Privy Council, 37.

[The Franciska, a neutral Danish vessel, sailed in March, 1854, from Tarragona in Spain, with a cargo belonging to Spanish subjects, bound for Elsinore, Denmark, for orders, and thence for some safe port on the Baltic. She called at Elsinore on May 13, where she cleared "for the Baltic" generally, without naming any port. Off the entrance of the Gulf of Riga on May 22, she was captured by a British cruiser for a breach of the blockade of Riga and sent to England for adjudication. She was condemned by the judge of the High Court of Admiralty, Rt. Hon. Dr. Lushington, on the ground that the blockade was notorious at Elsinore on the day that the Franciska called there. The claimant, the Danish owner, appealed.]

The Right Hon. T. PEMBERTON LEIGH [LORD KINGSDOWN]. . . . In this case the ship was labouring under the utmost suspicion. She had no Latin pass, which the Danish Government provides for a ship of that country; she had no paper whatever on board showing the port for which she was bound. . . . There was every reason, therefore, to suspect, if Riga was at this time in a state of blockade, that the master had notice of it, and intended to break it. . . . Whatever may be the demerits of the ship, she cannot be condemned unless at the time when she committed the alleged offence the port for which she was sailing was legally in a state of blockade, and was known to be so by the master or owner. . . . It is established that on the 15th or 17th of April . . . the Admiral did establish . . . an effective blockade of the ports of Libau, Windau, and the Gulf of Riga. . . . But while the Admiral was taking these measures in the Baltic, the English and French Governments were taking measures at home of which he was ignorant, and which it is contended seriously affect the validity of the blockade in point of law. . . . [Here follows a recital of the ordinances of the British, French, and Russian Governments.]

As regards export, therefore, from the Baltic ports, by the effect of these several Ordinances all restriction up to the 15th of May, on the conveyance of cargoes in Russian vessels to British and French ports, was removed; and though British and French vessels would, by the general Law of Nations, be liable to con-

fiscation for breach of blockade, by sailing from blockaded ports with cargoes taken on board after notice of the blockade, and the permission to export is, by the Orders, in terms, confined to Russian vessels, it seems improbable that the Allied Powers could intend to deprive their subjects of the indulgence granted to them by the Russian Government, or to subject their property to confiscation for doing what the enemy was permitted to do with impunity.

In effect, therefore, neutrals only would be excluded from that commerce which belligerents might safely carry on; and the question is, whether by the Law of Nations such exclusion be justifiable; and, if not, in what manner and to what extent neutral Powers are entitled to avail themselves of the objection.

That such exclusion is not justifiable is laid down in the clearest and most forcible language in the following passage of the judgment now under review:—"The argument stands thus: By the Law of Nations a belligerent shall not concede to another belligerent, or take for himself, the right of carrying on commercial intercourse prohibited to neutral nations; and, therefore, no blockade can be legitimate that admits to either belligerent a freedom of commerce denied to the subjects of states not engaged in the war. The foundation of the principle is clear, and rooted in justice; for interference with neutral commerce at all is only justified by the right which war confers of molesting the enemy, all relations of trade being by war itself suspended. To this principle I entirely accede; and I should regret to think if any authority could be cited from the decisions of any British Court administering the Law of Nations, which could be with truth asserted to maintain a contrary doctrine."

The learned Judge, after discussing the question how far licenses to enter blockaded ports would invalidate a blockade, and pointing out the important distinctions between blockades according to the ordinary Law of Nations, and the blockades introduced during the last war by the Berlin and Milan Decrees on the one hand, and the British Orders in Council on the other, and between special licenses granted for a particular occasion and licenses granted indiscriminately, proceeds, "I think that if the relaxation of a blockade be, as to belligerents, entire, the blockade cannot lawfully subsist; if it be partial, and such as to exceed special occasion, that, to the extent of such partial relaxation, neutrals are entitled to a similar benefit." And he concludes his able discussion of this part of the case, in these words: "With respect to the present question, I, therefore, have come

to the conclusion, that as Russian vessels might have left the ports of Courland up to the 15th of May, the subjects of neutral States ought to be entitled to the same advantages, and if there be any vessel so circumstanced I should hold her entitled to restitution. I think the remedy should be commensurate with the grievance." The learned Judge holds that such relaxation does not affect the general validity of the blockade.

In order to judge how far this conclusion can be maintained, it is necessary to consider upon what principles the right of a belligerent to exclude neutrals from a blockaded port rests. That right is founded, not on any general unlimited right to cripple the enemy's commerce with neutrals by all means effectual for that purpose, for it is admitted on all hands that a neutral has a right to carry on with each of two belligerents during war all the trade that was open to him in times of peace, subject to the exceptions of trade in contraband goods and trade with blockaded ports. Both these exceptions seem founded on the same reason, namely, that a neutral has no right to interfere with the military operations of a belligerent either by supplying his enemy with materials of war, or by holding intercourse with a place which he has besieged or blockaded.

Grotius expresses himself upon the subject in these terms:— "*Si juris mei executionem rerum subvectio impedierit, idque scire potuerit, qui advexit, ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax expectabatur, tenebitur ille mihi de damno culpâ dato.*" De Jure Belli ac Pacis, lib. iii. c. i. § v.

Bynkershoek's commentary on this passage is to the effect that it is unlawful to carry anything, whether contraband or not, to a place thus circumstanced, since those who are within may be compelled to surrender, not merely by the direct application of force, but also by the want of provisions and other necessaries. "*Sola obsidio in causâ est, cur nihil obessis subvehere liceat, sive contrabandum sit, sive non sit, nam obsessi non tantum vi coguntur ad deditionem, sed et fame, et alia aliarum rerum penuria.*" Quae. Jur. Pub. lib. i. c. 11.

Wheaton in his "Elements of International Law," vol. ii. pp. 228-230, justly observes that this passage in Bynkershoek goes too far, and that a blockade is not confined to the case where there is a siege or blockade with a view to the capture of a place or the expectation of peace. But these passages seem to point to the reason on which this interference with the ordinary rights of neutrals was originally justified.

Vattel lays down the same doctrine:—"Quand je tiens une place assiégée, ou seulement bloquée, je suis en droit d'empêcher que personne n'y entre, et de traiter en ennemi quiconque entreprend d'y entrer sans ma permission, ou d'y porter quoi que ce soit: car il s'oppose à mon entreprise, il peut contribuer à la faire échouer, et par là me faire tomber dans tous les maux d'une guerre malheureuse." B. iii. c. vii. s. 1, 17.

These passages refer only to ingress and the importation of goods, but it is clear that the operations of the siege or blockade may be interrupted by any communication of the blockaded or besieged place with foreigners; and Lord Stowell, when he defines a blockade, always speaks of it as the exclusion of the blockaded place from all commerce, whether by egress or ingress. In The "Frederick Molke" (1 Rob. 87), he says: "What is the object of a blockade? not merely to prevent an importation of supplies; but to prevent export as well as import; and to cut off all communication of commerce with the blockaded place." In The "Betsey" (1 Rob. 93)—"After the commencement of a blockade a neutral cannot, I conceive, be allowed to interpose in any way to assist the exportation of the property of the enemy." In The "Vrouw Judith" (1 Rob. 151)—"A blockade is a sort of circumvallation round a place, by which all foreign connexion and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place; and a neutral is no more at liberty to assist the traffic of exportation than of importation." In The "Rolla" (6 Rob. 372), "What is a blockade but a uniform universal exclusion of all vessels not privileged by law?" In The "Success" (1 Dods. 134)—"The measure which has been resorted to, being in the nature of a blockade, must operate to the entire exclusion of British as well as neutral ships; for it would be a gross violation of neutral rights, to prohibit their trade, and to permit the subjects of this country to carry on an unrestricted commerce at the very same ports from which neutrals are excluded."

It is contended that the objection of a neutral to the validity of a blockade, on the ground of its relaxation by a belligerent in his own favour, is removed if a Court of Admiralty allows to the neutral the same indulgence which the belligerent has reserved to himself or granted to his enemy. But their Lordships have great difficulty in assenting to this proposition. In the first place, the particular relaxation, which may be of the greatest value to the belligerents, may be of little or no value to the

neutral. In the instance now before the Court it may have been of the utmost importance to Great Britain that there should be brought into her ports cargoes which, at the institution of the blockade, were in Riga; and it may have been for her advantage, with that view, to relax the blockade. But a relaxation of the blockade to that extent, and a permission to neutrals to bring such cargoes to British ports may have been of little or no value to neutrals.

The Counsel on both sides at their Lordships' bar understood that the learned Judge in this case intended thus to limit the rights of neutrals, and to place neutral vessels only in the same situation as Russians, under the Order in Council. Their Lordships would be inclined to give a more liberal interpretation to the language of the judgment; yet if this be done, the allowance of a general freedom of commerce, by way of export, to all vessels and to all places from a blockaded port, seems hardly consistent with the existence of any blockade at all.

Again, it is not easy to answer the objections a neutral might make, that the condition of things which alone authorizes any interference with his commerce does not exist, namely, the necessity of interdicting all communication by way of commerce with the place in question; that a belligerent, if he inflicts upon neutrals the inconvenience of exclusion from commerce with such place, must submit to the same inconvenience himself; and that if he is to be at liberty to select particular points in which it suits his purpose that the blockade should be violated with immunity, each neutral, in order to be placed on equal terms with the belligerent, should be at liberty to make such selection for himself.

But the ambiguity in which all these questions are left by the Order in Council of the 15th of April; the doubt whether the liberty accorded to enemies' vessels extends to neutrals, and, if so, whether such liberty is subject to the same restrictions, or to any other and what restrictions, affords, in the opinion of their Lordships, another strong argument against the legality of the blockade in this case. If a partial, modified blockade is to be enforced against neutrals, justice seems to require that the modifications intended to be introduced should be notified to neutral States, and that they should be fully apprized what acts their subjects may or may not do. They cannot reasonably be exposed to the hardship of either abstaining from all commerce with a place in such a state of uncertain blockade, or of having their ships seized and sent to the country of the belligerent, in

order to learn there, from the decision of its Court of Admiralty, whether the conduct they have pursued is, or is not, protected by an equitable interpretation of an instrument in which they are not expressly included.

If these views of the law be correct, this ship cannot be considered to have had notice of any blockade of Riga at the time when she sailed for that port; for, in truth, no legal blockade was then in existence, and it would be hard to require a neutral to speculate on the probability, however great, of a legal blockade *de facto* being established at a future time, when he is not permitted to speculate on the chance of its discontinuance after he has once had notice of its existence. . . .

Supposing, however, the blockade in this case to be open to no objections in point of law during the interval between the 15th of April and the 15th of May, it remains to be inquired whether the notice which this ship received of its existence was of such a character as to subject her to the penalty of confiscation for disregarding it. Notice has been imputed to the claimant in the Court below from the alleged notoriety of the blockade on the 14th of May, at Elsinore, where the ship touched, and at Copenhagen, where the owner resided.

It is contended by the appellant that in a case of ingress of a port subject to a blockade only *de facto* of which there has not been any official notification, guilty knowledge cannot be inferred in an individual from general notoriety, and that a ship is always entitled under such circumstances to warning from the blockading squadron before she is exposed to seizure.

To this proposition their Lordships are unable to accede. If a blockade *de facto* be good in law without notification, and a wilful violation of a known legal blockade be punishable with confiscation—propositions which are free from doubt,—the mode in which the knowledge has been acquired by the offender, if it be clearly proved to exist, cannot be of importance. Nor does there seem for this purpose to be much difference between ingress, in which a warning is said to be indispensable, and egress, in which it is admitted to be unnecessary.

The fact of knowledge is capable of much easier proof in the one case than in the other; but when once the fact is clearly proved, the consequences must be the same. The reasoning of the learned Judge of the Court below in this case, and the language of Lord Stowell in The "Adelaide" reported in the note to The "Neptunus," (2 Rob. 111) and The "Hurtige Hane," (3 Rob. 324,) are conclusive upon this point.

But while their Lordships are quite prepared to hold that the existence and extent of a blockade may be so well and so generally known, that knowledge of it in an individual may be presumed without distinct proof of personal knowledge, and that knowledge so acquired may supply the place of a direct communication from the blockading squadron, yet the fact, with notice of which the individual is so to be fixed, must be one which admits of no reasonable doubt. "Any communication which brings it to the knowledge of the party," to use the language of Lord Stowell in The "Rolla", (6 Rob. 367), " in a way which could leave no doubt in his mind as to the authenticity of the information."

Again, the notice to be inferred from general notoriety, must be of such a character that if conveyed by a distinct intimation from a competent authority it would have been binding; the notice cannot be more effectual because its existence is presumed, than it would be if it were directly established in evidence. The notice to be inferred from the acts of a belligerent, which is to supply the place of a public notification, or of a particular warning, must be such as, if given in the form of a public notification, or of a particular warning, would have been legal and effectual.

For this purpose the notice of the blockade must not be more extensive than the blockade itself. A belligerent cannot be allowed to proclaim that he has instituted a blockade of several ports of the enemy, when in truth he has only blockaded one; such a course would introduce all the evils of what is termed a paper blockade, and would be attended with the grossest injustice to the commerce of neutrals. Accordingly a neutral is at liberty to disregard such a notice, and is not liable to the penalties attending a breach of blockade, for afterwards attempting to enter the port which really is blockaded.

This was distinctly laid down by Lord Stowell in the case of The "Henrich and Maria", (1 Rob., 148), where an officer of the blockading squadron had informed a neutral that all the Dutch ports were in a state of blockade, whereas the blockade was confined to Amsterdam. The ship was afterwards captured for an alleged attempt to enter Amsterdam, and Lord Stowell, in decreeing restitution, observed: "The notice is, I think, in point of authority, illegal; at the time when it was given, there was no blockade which extended to all the Dutch ports. A declaration of blockade is a high act of sovereignty; and a Commander of a King's ship is not to extend it. The notice is, also, I think, as illegal in effect as in authority: it cannot be said that

such a notice, though bad for other ports, is good for Amsterdam. It takes from the neutral all power of election as to what other port of Holland he should go, when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral to this kind of distress; and I am of the opinion, that if the neutral had contravened the notice, he would not have been subject to condemnation."

The authority of this case is fully recognized by Dr. Lushington in the present case, who observes that such an administration of law in protecting the party misled, was most just.

Applying these principles to the evidence before them, their Lordships can have no doubt that the master and owner in this case are to be fixed with notice of all that was publicly known at Copenhagen on the 14th of May, on the subject of the blockade; that it was known there that merchant-vessels had been turned back from ports on the coast of Courland, and that a general impression prevailed that vessels seeking to enter Russian ports ran great risk of seizure; and that the owner in this case shared that impression, and that to this cause are to be attributed the want of proper ships' papers, which has been already alluded to, and the absence, on the further proof, of any affidavit on the part of the owner denying knowledge of the blockade. . . .

[Their Lordships then examine the evidence as to what was known at Copenhagen as to the blockade of the Russian coast, and find that the only notice which the master could have received there at that time would have been that the entire Russian coast was blockaded,—a notice which was contrary to the facts and which if received from a British officer he would have been justified in disregarding.]

Their Lordships . . . must advise a restitution of the ship (or rather the proceeds, for it appears to have been sold) and of the freight, but certainly without any costs or damages to the claimant. There will be simple restitution, without costs or expenses to either party.

THE PETERHOFF.

SUPREME COURT OF THE UNITED STATES. 1866.
5 Wallace, 28.

Appeal from the District Court for the Southern District of New York.

[In 1862 the President proclaimed a blockade of the "whole coast from the Chesapeake Bay to the Rio Grande." About forty

miles up the Rio Grande, on the American side of the river, is the town of Brownsville. On the opposite bank in Mexico is the city of Matamoras. While the blockade was in force, the Peterhoff, a British vessel, sailed from London for Matamoras, with a miscellaneous cargo part of which was the property of the owner of the vessel. In the Caribbean Sea to the south of Cuba, she was captured by an American war vessel and taken to New York where the vessel and cargo were condemned for intent to violate the blockade by sending her cargo in lighters up the river Rio Grande to the city of Matamoras, from which point much of her cargo was to be sent into Texas.]

The CHIEF JUSTICE [CHASE] delivered the opinion of the court. . . .

It was maintained in argument (1) that trade with Matamoras, at the time of the capture, was made unlawful by the blockade of the mouth of the Rio Grande; and if not, then (2) that the ulterior destination of the cargo was Texas and the other States in rebellion, and that this ulterior destination was in breach of the blockade. . . .

In determining the question whether this blockade was intended to include the mouth of the Rio Grande, the treaty with Mexico, 9 Stat. at Large, 926, in relation to that river must be considered. It was stipulated in the 5th article that the boundary line between the United States and Mexico should commence in the Gulf, three leagues from land opposite the mouth of the Rio Grande, and run northward from the middle of the river. And in the 7th article it was further stipulated that the navigation of the river should be free and common to the citizens of both countries without interruption by either without the consent of the other, even for the purpose of improving the navigation.

The mouth of the Rio Grande was, therefore, for half its width, within Mexican territory, and, for the purposes of navigation, was, altogether, as much Mexican as American. It is clear, therefore, that nothing short of an express declaration by the Executive would warrant us in ascribing to the government an intention to blockade such a river in time of peace between the two Republics. . . . And we are the less inclined to say it, because we are not aware of any instance in which a belligerent has attempted to blockade the mouth of a river or harbor occupied on one side by neutrals, or in which such a blockade has been recognized as valid by any court administering the law of nations. . . .

We come next to the question whether an ulterior destination to the rebel region, which we now assume as proved, affected the cargo of the Peterhoff with liability to condemnation. We mean the neutral cargo: reserving for the present the question of contraband. . . .

It is an undoubted general principle, recognized by this court in the case of The Bermuda, and in several other cases, that an ulterior destination to a blockaded port will infect the primary voyage to a neutral port with liability for intended violation of blockade.

The question now is whether the same consequences will attend an ulterior destination to a belligerent country by inland conveyance. And upon this question the authorities seem quite clear.

During the blockade of Holland in 1799, goods belonging to Prussian subjects were shipped from Edam, near Amsterdam, by inland navigation to Emden, in Hanover, for transshipment to London. Prussia and Hanover were neutral. The goods were captured on the voyage from Emden, and the cause, The Stert, 4 Robinson, 65, came before the British Court of Admiralty in 1801. It was held that the blockade did not affect the trade of Holland carried on with neutrals by means of inland navigation. "It was," said Sir William Scott, "a mere maritime blockade effected by force operating only at sea." He admitted that such trade would defeat, partially at least, the object of the blockade, namely, to cripple the trade of Holland, but observed, "If that is the consequence, all that can be said is that it is an unavoidable consequence. It must be imputed to the nature of the thing which will not admit of a remedy of this species. The court cannot on that ground take upon itself to say that a legal blockade exists where no actual blockade can be applied. . . . It must be presumed that this was foreseen by the blockading state, which, nevertheless, thought proper to impose it to the extent to which it was practicable."

The same principle governed the case of The Ocean, 3 Robinson, 297, made also in 1801. At the time of her voyage Amsterdam was blockaded, but the blockade had not been extended to the other ports of Holland. Her cargo consisted partly or wholly of goods ordered by American merchants from Amsterdam and sent thence by inland conveyance to Rotterdam, and there shipped to America. It was held that the conveyance from Amsterdam to Rotterdam, being inland, was not affected by the blockade, and the goods, which had been captured, were restored.

These were cases of trade from a blockaded to a neutral country by means of inland navigation, to a neutral port or a port not blockaded. The same principle was applied to trade from a neutral to a blockaded country by inland conveyance from the neutral port of primary destination to the blockaded port of ulterior destination in the case of the Jonge Pieter, 4 Robinson, 79, adjudged in 1801. Goods belonging to neutrals going from London to Emden, with ulterior destination by land or an interior canal navigation to Amsterdam were held not liable to seizure for violation of the blockade of that port. . . . These cases fully recognize the lawfulness of neutral trade to or from a blockaded country by inland navigation or transportation.

The general doctrines of international law lead irresistibly to the same conclusion. We know of but two exceptions to the rule of free trade by neutrals with belligerents: the first is that there must be no violation of blockade or siege: and the second, that there must be no conveyance of contraband to either belligerent. And the question we are now considering is, "Was the cargo of the Peterhoff within the first of these exceptions?" We have seen that Matamoras was not and could not be blockaded; and it is manifest that there was not and could not be any blockade of the Texan bank of the Rio Grande as against the trade of Matamoras.

We must say, therefore, that trade, between London and Matamoras, even with attempt to supply, from Matamoras, goods to Texas, violated no blockade, and cannot be declared unlawful.

[The remaining portion of the opinion, dealing with the question of contraband, may be found, *post*, p. 385.]

NOTE.—The right to blockade an enemy's ports by a competent force is secured to every belligerent by the law of nations and neutrals are bound to respect it, M'Call v. Marine Insurance Co. (1814), 8 Cranch, 59; The Prize Cases (1863), 2 Black, 635; The Admiral (1866), 3 Wallace, 603. As it is a war right it can be exercised only when war exists, Ford v. Surget (1879), 97 U. S. 594. A declaration of a blockade is a high act of sovereignty and can be made only on governmental authority, The Henrick and Maria (1799), 1 C. Robinson, 146, 148, but before the invention of the telegraph it was held that a commander on a distant station might institute a blockade without express authority, The Rolla (1807), 6 Ib. 364. A blockade of a single port may be instituted by a subordinate officer when it is a part of another military or naval operation, The Circassian (1865), 2 Wallace, 135; The Adula (1900), 176 U. S. 361.

The gist of the offense of breach of blockade lies, in Anglo-American prize law, in the intent to enter a blockaded port, The Columbia (1799), 1 C. Robinson, 154; The James Cook (1810), Edwards, 261; The Veteran (1905), Takahashi, 714. Hence a blockade runner is *in delicto* from the

moment of sailing, The Galen (1901), 37 Ct. Cl. 89, and the mere act of sailing is illegal and subjects the vessel to capture, The Neptunus (1799), 2 C. Robinson, 110; The Panaghia Rhomba (1858), 12 Moore, P. C. 168; The Bermuda (1866), 3 Wallace, 514; United States v. Hallock (1864), 154 U. S. 537. But the intent must be established by affirmative evidence. Mere suspicion is not enough, The Newfoundland (1900), 176 U. S. 97. For discussions of evidence showing intent see The Sea Witch (1868), 6 Wallace, 242; The Flying Scud (1868), 6 Ib. 263; The Adela (1868), 6 Ib. 266; The Wren (1868), 6 Ib. 582. But sailing for a blockaded port is an innocent act unless accompanied by knowledge of the blockade, Fitzsimmons v. Newport Insurance Co. (1808), 4 Cranch, 185, 198; Yeaton v. Fry (1809), 5 Cranch, 335; The Admiral (1866), 3 Wallace, 603. Whether knowledge is derived from a formal proclamation, The Cornelius (1866), 3 Wallace, 214, or from notification entered on a vessel's log or from any other source is immaterial, The Adula (1900), 176 U. S. 361. Under Anglo-American practice a master with notice of a blockade is not permitted to approach a blockaded port for the purpose of inquiring whether the blockade has been raised, The Spes (1804), 5 C. Robinson, 76; The Little William (1809), 1 Acton, 141; The Josephine (1866), 3 Wallace, 83; The Cheshire (1866), 3 Wallace, 231, but the French permit him to hope that the blockade will have been discontinued by the time of his arrival and hence he may approach for inquiry, Bonfils (Fauchille), 1062. Vessels may expose themselves to seizure merely by suspicious conduct, as by hovering about the entrance to a blockaded port, The Neutralitet (1805), 6 C. Robinson, 30; The Charlotte Christine (1805), 6 Ib. 101. St. Paul's admonition, "Avoid the very appearance of evil," is a good rule for the conduct of neutral vessels at sea in time of war. But under the pressure of great necessity such as unseaworthiness or lack of provisions, a neutral vessel may be justified in taking refuge in a blockaded port, The Diana (1869), 7 Wallace, 354. "Real and irresistible distress," said Lord Stowell, "must be at all times a sufficient passport for human beings under any such application of human laws." See The Hurtige Hane (1799), 2 C. Robinson, 124; The Charlotta (1810), Edwards, 252; Hallett & Bowne v. Jenks (1805), 3 Cranch, 210; Brig Short Staple v. United States (1815), 9 Ib. 55; The Aeolus (1818), 3 Wheaton, 392. But he who pleads the necessity has the burden of proof, The Diana (1869), 7 Wallace, 354.

The penalty for breach of blockade is confiscation of the vessel and cargo. In The Mercurius (1798), 1 C. Robinson, 80, Lord Stowell made a distinction when the vessel and cargo belonged to different owners, but this distinction was abandoned, even by Lord Stowell himself, The Alexander (1801), 4 Ib. 93; The Adonis (1804), 5 Ib. 256; The Exchange (1808), Edwards, 39; The James Cook (1810), Ib. 261; The Panaghia Rhomba (Baltazzi v. Ryder) (1858), 12 Moore, P. C. 168; The William Bagaley (1867), 5 Wallace, 377, 410. Success in eluding the blockading force does not exempt a vessel from capture, The Welvaart Van Pillaw (1799), 2 C. Robinson, 128, but it remains liable to capture until the end of its return voyage, The Wren (1868), 6 Wallace, 582, unless prior to capture the blockade has been raised, The Lisette (1806), 6 C. Robinson, 387.

On the law of blockade see Atherley-Jones, ch. ii; Bonfils (Fauchille), 1038; Fauchille, *Du Blocus Maritime;* J. A. Hall, *The Law of Naval Warfare,* ch. vi; *Int. Law Situations, 1901,* 139; Ib. *1907,* 109; Ib. *1908,* 9, 98; Ib. *1912,* 114; *Int. Law Topics, 1914,* 100; Moore, *Digest,* VII, ch. xvii.

Section 2. Notified and De Facto Blockades.

THE ADULA.

Supreme Court of the United States. 1900.
176 U. S. 361.

Appeal from the District Court of the United States for the Southern District of Georgia.

Mr. Justice Brown . . . delivered the opinion of the court.

The rectitude of the decree of the District Court condemning the Adula as prize of war depends upon the existence of a lawful and effective blockade at Guantanamo, the knowledge of such blockade by those in charge of the vessel, and their intent in making the voyage from Kingston.

1. No blockade of Guantanamo was ever proclaimed by the President. A proclamation had been issued June 27, establishing a blockade of all ports on the southern coast of Cuba between Cape Frances on the west and Cape Cruz on the east, but as both Santiago and Guantanamo are to the eastward of Cape Cruz, they were not included. It appears, however, that blockades of Santiago and Guantanamo were established in the early part of June by order of Admiral Sampson, commander of the naval forces then investing the ports on the southern coast of Cuba, and were maintained as actual and effective blockades until after the capture of the Adula.

The legality of a simple or actual blockade as distinguished from a public or presidential blockade is noticed by writers upon international law, and is said by Halleck to be "constituted merely by the fact of an investment, and without any necessity of a public notification. As it arises solely from facts it ceases when they terminate; its existence must, therefore, in all cases, be established by clear and decisive evidence." (Halleck, Int. L. ch. 23, sec. 10.) A *de facto* blockade was also recognized as legal by this court in the case of The Circassian, 2 Wall. 135, 150, in which the question arose as to the blockade of New Orleans during the civil war. In delivering the opinion of the court, the Chief Justice observed: "There is a distinction between simple and public blockades which supports this conclusion. A simple blockade may be established by a naval officer, acting upon his own discretion or under direction of superiors, without governmental notification; while a public blockade is not only estab-

lished in fact, but is notified, by the government directing it, to other governments. In the case of a simple blockade, the captors are bound to prove its existence at the time of capture; while in the case of a public blockade, the claimants are held to proof of discontinuance in order to protect themselves from the penalties of attempted violation." A like ruling was made by Sir William Scott in the case of The Rolla, 6 C. Rob. 364, which was the case of an American ship and cargo, proceeded against for the breach of a blockade at Montevideo, imposed by the British commander. It was argued, apparently upon the authority of The Henrick and Maria, 1 C. Rob. 123, that the power of imposing a blockade is altogether an act of sovereignty which cannot be assumed or exercised by a commander without special authority. But says the learned judge: "The court then expressed its opinion that this was a position not maintainable to that extent; because a commander going out to a distant station may reasonably be supposed to carry with him such a portion of sovereign authority, delegated to him, as may be necessary to provide for the exigencies of the service upon which he is employed. On stations in Europe, where government is almost at hand to superintend and direct the course of operations, under which it may be expedient that particular hostilities should be carried on, it may be different. But in distant ports of the world it cannot be disputed, I conceive, that a commander must be held to carry with him sufficient authority to act, as well against the commerce of the enemy, as against the enemy himself, for the immediate purpose of reduction." See also The Johanna Maria, Deane on Blockades, 86.

In view of the operations then being carried on for the purpose of destroying or capturing the Spanish fleet and reducing Santiago, we think it was competent for Admiral Sampson to establish a blockade there and at Guantanamo as an adjunct to such operations. Indeed, it would seem to have been a necessity that restrictions should be placed upon the power of neutrals to carry supplies and intelligence to the enemy as they would be quite sure to do if their ships were given free ingress and egress from these harbors. While there could be no objections to vessels carrying provisions to the starving insurgents, if their destination could be made certain, the probabilities were that such provisions carried to a beleaguered port, would be immediately seized by the enemy and used for the sustenance of its soldiers. The exigency was one which rendered it entirely prudent for the

commander of the fleet to act, without awaiting instructions from Washington.

But it is contended that at the time of the capture, the port of Guantanamo was completely in the possession and control of the United States, and therefore that the blockade had been terminated. It appears, however, that Guantanamo is eighteen miles from the mouth of Guantanamo Bay. Access to it is obtained either by a small river emptying into the upper bay, or by rail from Caimanera, a town on the west side of the upper bay. It seems that the Marblehead and the Yankee were sent to Guantanamo on June 7; entered the harbor and took possession of the lower bay for the use of American vessels; that the Panther and Yosemite were sent there on the 10th, and on the 12th the torpedo boat Porter arrived from Guantanamo with news of a land battle, and from that time the harbor was occupied by naval vessels, and by a party of marines who held the crest of a hill on the west side of the harbor near its entrance, and the side of the hill facing the harbor. But the town of Guantanamo, near the head of the bay, was still held by the Spanish forces, as were several other positions in the neighborhood. The campaign in the vicinity was in active progress, and encounters between the United States and Spanish troops were of frequent occurrence.

In view of these facts we are of opinion that, as the city of Guantanamo was still held by the Spaniards, and as our troops occupied only the mouth of the bay, the blockade was still operative as against vessels bound for the city of Guantanamo. . . . [The court also finds that both the charterer and officers of the Adula knew of the blockade and intended to violate it.]

The decree of the District Court was correct and it is therefore

Affirmed.

Mr. Justice Shiras, with whom concurred Mr. Justice Gray, Mr. Justice White and Mr. Justice Peckham, dissenting.

. . .

Note.—Accord: The Circassian (1865), 2 Wallace, 135. The correctness of the decision in both The Circassian and The Adula may well be doubted. The defeated claimants in The Circassian appealed to the British and American Claims Commission provided for by the Treaty of Washington which allowed their claims. The opinion of the dissenting commissioner in favor of sustaining the Supreme Court went upon the ground that there was a distinction between the city of New Orleans and the port of New Orleans; that the blockade had extended to the whole port while the military occupation comprised only the city which, in point of area, was but a

small part of the port. See Moore, *Int. Arb.* IV, 3911, and an able discussion by Everett P. Wheeler in "The Law of Prize as affected by Decisions upon Captures made during the Late War between Spain and the United States," in *Col. Law Rev.* I, 141, 150.

Section 3. A Blockade Must be Effective.

THE OLINDE RODRIGUES.

Supreme Court of the United States. 1899.
174 U. S. 510.

Appeal from the District Court of the United States for the District of South Carolina.

[The Olinde Rodrigues, a steamship belonging to a French corporation, sailed from France for the West Indies June 16, 1898. On June 27, the President of the United States proclaimed a blockade of San Juan, Porto Rico. On July 4, the steamer entered the harbor of San Juan and on coming out the next day was boarded by the American cruiser Yosemite. She disclaimed any knowledge that San Juan was blockaded, whereupon the boarding officer entered an official warning on her log and she was allowed to proceed. On July 17 she was captured by the American cruiser New Orleans, then blockading San Juan, for attempting to enter that port, taken to Charleston, South Carolina, and libelled. The District Court held that there was no effective blockade of the port of San Juan. The United States appealed.]

Mr. Chief Justice Fuller . . . delivered the opinion of the court.

We are unable to concur with the learned District Judge in the conclusion that the blockade of the port of San Juan at the time this steamship was captured was not an effective blockade.

To be binding, the blockade must be known, and the blockading force must be present; but is there any rule of law determining that the presence of a particular force is essential in order to render a blockade effective? We do not think so, but on the contrary, that the test is whether the blockade is practically effective, and that that is a question, though a mixed one, more of fact than of law.

The fourth maxim of the Declaration of Paris (April 16, 1856) was: "Blockades, in order to be binding, must be effective, that is

to say, maintained by a force sufficient really to prevent access to the coast of the enemy." Manifestly this broad definition was not intended to be literally applied. The object was to correct the abuse, in the early part of the century, of paper blockades, where extensive coasts were put under blockade by proclamation, without the presence of any force, or an inadequate force; and the question of what might be sufficient force was necessarily left to be determined according to the particular circumstances.

This was put by Lord Russell in his note to Mr. Mason of February 10, 1861, thus: "The Declaration of Paris was in truth directed against what were once termed 'paper blockades;' that is, blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as an occasional appearance of a man-of-war in the offing or the like. . . . The interpretation, therefore, placed by Her Majesty's Government on the declaration was, that a blockade, in order to be respected by neutrals, must be practically effective. . . . It is proper to add, that the same view of the meaning and effect of the articles of the Declaration of Paris, on the subject of blockades, which is above explained, was taken by the representative of the United States at the Court of St. James (Mr. Dallas) during the communications which passed between the two governments some years before the present war, with a view to the accession of the United States to that declaration." Hall's Int. Law, § 260, p. 730, note.

The quotations from the Parliamentary debates, of May, 1861, given by Mr. Dana in note 233 to the eighth edition of Wheaton on International Law, afford interesting illustrations of what was considered the measure of effectiveness; and an extract is also there given from a note of the Department of Foreign Affairs of France of September, 1861, in which that is defined: "Forces sufficient to prevent the ports being approached without exposure to a certain danger."

In The Mercurius, 1 C. Rob. 80, 84, Sir William Scott stated: "It is said, this passage to the Zuyder Zee was not in a state of blockade; but the ship was seized immediately on entering it; and I know not what else is necessary to constitute blockade. The powers who formed the armed neutrality in the last war, understood blockade in this sense; and Russia, who was the principal party in that confederacy, described a place to be in a state of blockade, when it is dangerous to attempt to enter into it."

And in The Frederick Molke, 1 C. Rob. 86, the same great jurist said: "For that a legal blockade did exist, results neces-

sarily from these facts, as nothing farther is necessary to constitute blockade, than that there should be a force stationed to prevent communication, and a due notice, or prohibition given to the party."

Such is the settled doctrine of the English and American courts and publicists, and it is embodied in the second of the instructions issued by the Secretary of the Navy, June 20, 1898, General Order No. 492: "A blockade to be effective and binding must be maintained by a force sufficient to render ingress to or egress from the port dangerous."

Clearly, however, it is not practicable to define what degree of danger shall constitute a test of the efficiency and validity of a blockade. It is enough if the danger is real and apparent.

In The Franciska, 2 Spinks, 128, Dr. Lushington, in passing on the question whether the blockade imposed on the port of Riga was an effective blockade, said: "What, then, is an efficient blockade, and how has it been defined, if, indeed, the term 'definition' can be applied to such a subject? The one definition mentioned is, that egress or entrance shall be attended with evident danger; another, that of Chancellor Kent, (1 Kent's Com. 146,) is, that it shall be apparently dangerous. All these definitions are and must be, from the nature of blockades, loose and uncertain; the maintenance of a blockade must always be a question of degree,—of the degree of danger attending ships going into or leaving a blockaded port. Nothing is further from my intention, nor, indeed, more opposed to my notions of the Law of Nations, than any relaxation of the rule that a blockade must be efficiently maintained; but it is perfectly obvious that no force could bar the entrance to absolute certainty; that vessels may get in and get out during the night, or fogs, or violent winds, or occasional absence; that it is most difficult to judge from numbers alone."

"It is impossible," says Mr. Hall, (§ 260,) "to fix with any accuracy the amount of danger in entry which is necessary to preserve the validity of a blockade. It is for the prize courts of the belligerent to decide whether in a given instance a vessel captured for its breach had reason to suppose it to be nonexistent; or for the neutral government to examine, on the particular facts, whether it is proper to withhold or to withdraw recognition."

In The Hoffnung, 6 C. Rob. 112, 117, Sir William Scott said: "When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent im-

posing the blockade, there is no reason to suppose that such a circumstance would create a change of system, since it could not be expected that any blockade would continue many months, without being liable to such temporary interruptions. But when a squadron is driven off by a superior force, a new course of events arises, which may tend to a very different disposition of the blockading force, and which introduces therefore a very different train of presumptions, in favor of the ordinary freedom of commercial speculations. In such a case the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed." And undoubtedly a blockade may be so inadequate, or the negligence of the belligerent in maintaining it may be of such a character, as to excuse neutral vessels from the penalties for its violation. Thus in the case of an alleged breach of the blockade of the island of Martinique, which had been carried on by a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island, it was held that their withdrawal was a neglect which "necessarily led neutral vessels to believe these ports might be entered without incurring any risk." The Nancy, 1 Acton, 57, 59.

But it cannot be that a vessel actually captured in attempting to enter a blockaded port, after warning entered on her log by a cruiser off that port only a few days before, could dispute the efficiency of the force to which she was subjected.

As we hold that an effective blockade is a blockade so effective as to make it dangerous in fact for vessels to attempt to enter the blockaded port, it follows that the question of effectiveness is not controlled by the number of the blockading force. In other words, the position cannot be maintained that one modern cruiser though sufficient in fact is not sufficient as matter of law.

Even as long ago as 1809, in The Nancy, 1 Acton, 63, where the station of the vessel was sometimes off the port of Trinity and, at others, off another port more than seven miles distant, it was ruled that: "Under particular circumstances a single vessel may be adequate to maintain the blockade of one port and cooperate with other vessels at the same time in the blockade of another neighboring port;" although there Sir William Grant relied on the opinion of the commander on that station that the force was completely adequate to the service required to be performed.

The ruling of Dr. Lushington in The Franciska, above cited, was to that effect, and the text-books refer to other instances.

The learned District Judge, in his opinion, refers to the treaty between France and Denmark of 1742, which provided that the entrance to a blockaded port should be closed by at least two vessels or a battery on shore; to the treaty of 1760 between Holland and the Two Sicilies prescribing that at least six ships of war should be ranged at a distance slightly greater than gunshot from the entrance; and to the treaty between Prussia and Denmark of 1818, which stipulated that two vessels should be stationed before every blockaded port; but we do not think these particular agreements of special importance here, and, indeed, Ortolan, by whom they are cited, says that such stipulations cannot create a positive rule in all cases even between the parties, "since the number of vessels necessary to a complete investment depends evidently on the nature of the place blockaded." 2 Ortolan, (4th ed.) 330, and note 2.

Nor do we regard Sir William Scott's judgment in The Arthur, (1814) 1 Dodson, 423, 425, as of weight in favor of claimants. In effect the ruling sustained the validity of the maintenance of blockade by a single ship, and the case was thus stated: "This is a claim made by one of His Majesty's ships to share as joint-captor in a prize taken in the river Ems by another ship belonging to His Majesty, for a breach of the blockade imposed by the order in council of the 26th of April, 1809. This order was, among others, issued in the way of retaliation for the measures which had been previously adopted by the French government against the commerce of this country. The blockade imposed by it is applicable to a very great extent of coast, and was never intended to be maintained according to the usual and regular mode of enforcing blockades, by stationing a number of ships and forming as it were an arch of circumvallation around the mouth of the prohibited port. There, if the arch fails in any one part, the blockade itself fails altogether; but this species of blockade, which has arisen out of the violent and unjust conduct of the enemy, was maintained by a ship stationed anywhere in the neighborhood of the coast, or, as in this case, in the river itself, observing and preventing every vessel that might endeavor to effect a passage up or down the river."

Blockades are maritime blockades, or blockades by sea and land; and they may be either military or commercial, or may partake of the nature of both. The question of effectiveness must necessarily depend on the circumstances. We agree that the fact of a single capture is not decisive of the effectiveness of

a blockade, but the case made on this record does not rest on that ground.

We are of opinion that if a single modern cruiser blockading a port renders it in fact dangerous for other craft to enter the port, that is sufficient, since thereby the blockade is made practically effective. . . .

Assuming that the Olinde Rodrigues attempted to enter San Juan, July 17, there can be no question that it was dangerous for her to do so, as the result itself demonstrated. She had had actual warning twelve days before; no reason existed for the supposition that the blockade had been pretermitted or relaxed; her commander had no right to experiment as to the practical effectiveness of the blockade, and, if he did so, he took the risk; he was believed to be making the attempt, and was immediately captured. In these circumstances the vessel cannot be permitted to plead that the blockade was not legally effective. . . .

[The court then finds that while the conduct of the Olinde Rodrigues on July 17 was so suspicious as to justify seizure the facts did not clearly show an intent to enter the port of San Juan.]

The entire record considered, we are of opinion that restitution of the Olinde Rodrigues should be awarded, without damages, and that payment of the costs and expenses incident to her custody and preservation, and of all costs in the cause except the fees of counsel, should be imposed upon the ship.

The decree of the District Court will be so modified, and

As modified affirmed.

MR. JUSTICE MCKENNA dissented on the ground that the evidence justified condemnation.

NOTE.—In 1806-07 Great Britain and France, by a series of proclamations which were fantastic in their absurdity, purported to establish complete blockades of each other's coasts. See The Arthur (1814), 1 Dodson, 423; The Fox (1811), Edwards, 311. The obvious impossibility of sustaining such extravagant pretensions and the damage inflicted upon neutral commerce strengthened the view which had been many times asserted that neutrals should recognize only such blockades as belligerents could make effective. In 1800, John Marshall, then Secretary of State, wrote to the American minister to England:

> If the effectiveness of the blockade be dispensed with, then every port of the belligerent powers may at all times be declared in that state, and the commerce of neutrals be thereby subjected to universal capture. But, if this principle be strictly adhered to, the capacity to blockade will be limited by the naval force of the belligerent

erent, and, of consequence, the mischief to neutral commerce cannot be very extensive.

Marshall to Rufus King, Sept. 20, 1800; Moore, *Digest*, VII, 788.

As to what constitutes an effective blockade see Geipel v. Smith (1872), L. R. 7 Q. B. 404, 410; The Adula (1900), 176 U. S. 361; Hooper v. United States (1887), 22 Ct. Cl. 408; The King Arthur (1905), Takahashi, 721. The number and position of the blockading vessels is immaterial so long as they are able to make the blockade effective, The Franciska (1855), 10 Moore, P. C. 37, and in the absence of evidence to the contrary the testimony of the commander of the blockading squadron as to its effectiveness will be accepted, The Nancy (1809), 1 Acton, 63. The fact that blockading vessels are not seen on approaching the port does not render the blockade ineffective, The Andromeda (1865), 2 Wallace, 481, nor will a temporary withdrawal of the blockading force because of stress of weather, The Frederick Molke (1798), 1 C. Robinson, 86; The Columbia (1799), 1 C. Robinson, 154, but lack of diligence on the part of the blockading squadron will be evidence that there was no blockade actually in existence, The Juffrow Maria Schroeder (1800), 3 C. Robinson, 147. Batteries ashore as well as ships afloat may be used in the maintenance of a blockade, The Circassian (1865), 2 Wallace, 135, and it would seem that temporary obstructions in the channels and harbors of the blockaded port are permissible. See Moore, *Digest*, VII, 855. As to blockade by sub-marine mines during the Great War, see Phillipson, *International Law and the Great War*, 381.

CHAPTER XII.

CONTRABAND.

Section 1. Absolute and Conditional Contraband.

THE JONGE MARGARETHA.

High Court of Admiralty of Great Britain. 1799.
1 C. Robinson, 189.

This was a case of a Papenberg ship, taken on a voyage from Amsterdam to Brest with a cargo of cheese, April, 1797.

Sir W. Scott [Lord Stowell]—There is little reason to doubt the property in this case, and therefore passing over the observations which have been made on that part of the subject, I shall confine myself to the single question: Is this a legal transaction in a neutral, being the transaction of a Papenberg ship carrying Dutch cheeses from Amsterdam to Brest, or Morlaix (it is said), but certainly to Brest? or, as it may be otherwise described, the transaction of a neutral carrying a cargo of provisions, not the product and manufacture of his own country, but of the enemy's ally in the war—of provisions which are a capital ship's store—and to the great port of naval equipment of the enemy.

If I adverted to the state of Brest at this time, it might be no unfair addition to the terms of the description, if I noticed, what was notorious to all Europe at this time, that there was in that port a considerable French fleet in a state of preparation for sallying forth on a hostile expedition; its motions at that time were watched with great anxiety by a British fleet which lay off the harbour for the purpose of defeating its designs. Is the carriage of such a supply to such a place, and on such an occasion, a traffic so purely neutral, as to subject the neutral trader to no inconvenience?

If it could be laid down as a general position, in the manner in which it has been argued, that cheese being a provision is

universally contraband, the question would be readily answered: but the Court lays down no such position. The catalogue of contraband has varied very much, and sometimes in such a manner as to make it very difficult to assign the reason of the variations; owing to particular circumstances, the history of which has not accompanied the history of the decisions. In 1673, when many unwarrantable rules were laid down by public authority respecting contraband, it was expressly asserted by Sir R. Wiseman, the King's Advocate, upon a formal reference made to him, that by the practice of the English Admiralty, corn, wine, and oil were liable to be deemed contraband. "I do agree," says he, reprobating the regulations that had been published, and observing that rules are not to be so hardly laid down as to press upon neutrals, "that corn, wine, and oil will be deemed contraband."

These articles of provisions then were at that time confiscable, according to the judgment of a person of great knowledge and experience in the practice of this Court. In much later times many other sorts of provisions have been condemned as contraband. In 1747, in the Jonge Andreas, butter, going to Rochelle, was condemned; how it happened that cheese at the same time was more favourably considered, according to the case cited by Dr. Swabey, I don't exactly know; the distinction appears nice; in all probability the cheeses were not of the species which is intended for ship's use. Salted cod and salmon were condemned in the Jonge Frederick, going to Rochelle, in the same year; in 1748, in the Joannes, rice and salted herrings were condemned as contraband. These instances show that articles of human food have been so considered, at least where it was probable that they were intended for naval or military use.

I am aware of the favourable positions laid down upon this matter by Wolfius and Vattel, and other writers of the continent, although Vattel expressly admits that provisions may, under circumstances, be treated as contraband. And I take the modern established rule to be this, that generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it. The Court must therefore look to the circumstances under which this supply was sent.

Among the circumstances which tend to preserve provisions from being liable to be treated as contraband, one is, that they are of the growth of the country which exports them. In the present case, they are the product of another country, and that a hostile country; and the claimant has not only gone out of his

way for the supply of the enemy, but he has assisted the enemy's ally in the war by taking off his surplus commodities.

Another circumstance to which some indulgence, by the practice of nations, is shewn, is, when the articles are in their native and unmanufactured state. Thus iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favourably considered than cordage, and wheat is not considered as so noxious a commodity as any of the final preparations of it for human use. In the present case, the article falls under this unfavourable consideration, being a manufacture prepared for immediate use.

But the most important distinction is, whether the articles were intended for the ordinary use of life, or even for mercantile ship's use; or whether they were going with a highly probable destination to military use? Of the matter of fact, on which the distinction is to be applied, the nature and quality of the port to which the articles were going, is not an irrational test; if the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. *Contra,* if the great predominant character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final use of an article *ancipitis usus,* it is not an injurious rule which deduces both ways the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful.

In the case of the Eendraght, cited for the claimant, the destination was to Bourdeaux; and though smaller vessels of war may be occasionally built and fitted out there, it is by no means a port of naval military equipment in its principal occupation, in the same manner as Brest is universally known to be.

The Court, however, was unwilling in the present case, to conclude the claimant on the mere point of destination, it being alleged that the cheeses were not fit for naval use, but were merely luxuries for the use of domestic tables. It therefore permitted both parties to exhibit affidavits as to their nature and quality. The claimant has exhibited none; but here are authen-

tic certificates from persons of integrity and knowledge, that they are exactly such cheeses as are used in British ships, when foreign cheeses are used at all; and that they are exclusively used in French ships of war.

Attending to all these circumstances, I think myself warranted to pronounce these cheeses to be contraband, and condemn them as such. As, however, the party has acted without dissimulation in the case, and may have been misled by an inattention to circumstances, to which in strictness he ought to have adverted, as well as by something like an irregular indulgence on which he has relied; I shall content myself with pronouncing the cargo to be contraband, without enforcing the usual penalty of the confiscation of the ship belonging to the same proprietor.

THE IMINA.

HIGH COURT OF ADMIRALTY OF GREAT BRITAIN. 1800.
3 C. Robinson, 167.

This was a case of a cargo of ship timber which had sailed July 1798, from Dantzick, originally for Amsterdam, but, was going at the time of capture to Embden, in consequence of information of the blockade of Amsterdam. . . .

Sir W. SCOTT [LORD STOWELL]—This is a claim for a ship taken, as it is admitted, at the time of capture sailing for Embden, a neutral port; a destination on which, if it is considered as the real destination, no question of contraband could arise; inasmuch as goods going to a neutral port, cannot come under the description of contraband, all goods going there being equally lawful. It is contended, however, that they are of such a nature, as to become contraband, if taken on a destination to a hostile port. On this point, some difference of opinion seems to have been entertained; and the papers which are brought in, may be said to leave this important fact in some doubt. Taking it, however, that they are of such a nature as to be liable to be considered as contraband on a hostile destination, I cannot fix that character on them in the present voyage. The rule respecting contraband, as I have always understood it, is, that the articles must be taken *in delicto,* in the actual prosecution of the voyage to an enemy's port. Under the present understanding of the law of nations, you cannot generally take the proceeds in the

return voyage. From the moment of quitting port on a hostile destination, indeed, the offence is complete, and it is not necessary to wait, till the goods are actually endeavoring to enter the enemy's port; but beyond that, if the goods are not taken *in delicto,* and in the actual prosecution of such a voyage, the penalty is not now generally held to attach.

Some argument has been drawn in this case, from the conduct of the owners. It is said, "that they did not consider these articles as contraband; they were sent openly and without suppression or disguise:" perhaps that alone would not avail them. It appears, however, that Amsterdam was declared by this country to be in a state of blockade, a circumstance that would make it peculiarly criminal to attempt to carry a cargo of this nature to that port. The master receives information of this fact at Elsineur, and on consultation with the consul of the nation, to which the cargo belonged, changed his purpose and actually shaped his course for Embden, to which place he was sailing at the time of capture. I must ask then, was this property taken under such circumstances as make it subject to the penalty of contraband? Was it taken *in delicto,* in the prosecution of an intention of landing it at a hostile port? Clearly not—But it is said, that in the understanding and intention of the owner it was going to a hostile port; and that the intention on his part was complete, from the moment when the ship sailed on that destination; had it been taken at any period previous to the actual variation, there could be no question, but that this intention would have been sufficient to subject the property to confiscation; but when the variation had actually taken place, however arising, the fact no longer existed. There is no *corpus delicti* existing at the time of capture. In this point of view, I think, the case is very distinguishable from some other cases, in which, on the subject of deviation by the master, *into* a blockaded port, the Court did not hold the cargo, to be necessarily involved in the consequences of that act. It is argued, that as the criminal deviation of the master did not there immediately implicate the cargo; so here, the favourable alteration cannot protect it, and that the offence must in both instances, be judged by the act and designs of the owner. But in those cases there *was* the guilty act, really existing at the time of capture; both the ship and cargo were taken *in delicto;* and the only question was, to whom the *delictum* was to be imputed; if it was merely the offence of the master, it might bind the owner of the ship, whose agent he was; but the court held that it would be hard to bind

the owners of the cargo, by acts of the master, who is not *de jure* their agent, unless so specially constituted by them. In the present instance, there is no existing *delictum*. In those cases the criminal appearance, which did exist, was purged away, by considering the owners of the cargo not to be *necessarily* responsible for the act of the master: but here there is nothing requiring any explanation: The cargo is taken on a voyage to a neutral port. To say, that it is nevertheless exposed to condemnation, on account of the original destination, as it stood in the mind of the owners, would be carrying the penalty of contraband further than it has been ever carried by this or the superior court. If the capture had been made a day before, that is, before the alteration of the course, it might have been different; but however the variation has happened, I am disposed to hold, that the parties are entitled to the benefit of it; and that under that variation the question of contraband does not at all rise. I shall decree restitution; but as it was absolutely incumbent on the captors to bring the cause to adjudication, from the circumstance of the apparent original destination, I think they are fairly entitled to their expenses.

Restitution. Captor's expenses decreed.

THE PETERHOFF.

SUPREME COURT OF THE UNITED STATES. 1866.
5 Wallace, 28.

[The facts and the preceding parts of the opinion may be found *ante*, p. 365.]

The CHIEF JUSTICE [CHASE] delivered the opinion of the court. . . .

Thus far we have not thought it necessary to discuss the question of actual destination beyond Matamoras. . . . Destination in this case becomes specially important only in connection with the question of contraband.

And this brings us to the question: was any portion of the cargo of the Peterhoff contraband?

The classification of goods as contraband or not contraband has much perplexed text-writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable; but that which is best supported by American and English decisions may

be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes. Lawrence's Wheaton, 772-6, note: The Commercen, 1 Wheaton, 382; Dana's Wheaton, 629, note; Parson's' Mar. Law, 93-4. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.

A considerable portion of the cargo of the Peterhoff was of the third class, and need not be further referred to. A large portion, perhaps, was of the second class, but is not proved, as we think, to have been actually destined to belligerent use, and cannot therefore be treated as contraband. Another portion was, in our judgment, of the first class, or, if of the second, destined directly to the rebel military service. This portion of the cargo consisted of the cases of artillery harness, and of articles described in the invoices as "men's army bluchers," "artillery boots," and "government regulation gray blankets." These goods come fairly under the description of goods primarily and ordinarily used for military purposes in time of war. They make part of the necessary equipment of an army.

It is true that even these goods, if really intended for sale in the market of Matamoras, would be free of liability: for contraband may be transported by neutrals to a neutral port, if intended to make part of its general stock in trade. But there is nothing in the case which tends to convince us that such was their real destination, while all the circumstances indicate that these articles, at least, were destined for the use of the rebel forces then occupying Brownsville, and other places in the vicinity.

And contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband. The latter is liable to capture only when a violation of blockade is intended; the former when destined to the hostile country, or to the actual military or naval use of the enemy, whether blockaded or not. The trade of neutrals with belligerents in articles not contraband is absolutely free, unless interrupted by blockade; the conveyance

by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea. Hence, while articles, not contraband, might be sent to Matamoras and beyond to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture, though primarily destined to Matamoras.

We are obliged to conclude that the portion of the cargo which we have characterized as contraband must be condemned.

And it is an established rule that the part of the cargo belonging to the same owner as the contraband portion must share its fate. This rule is well stated by Chancellor Kent, thus: "Contraband articles are infectious, as it is called, and contaminate the whole cargo belonging to the same owners, and the invoice of any particular article is not usually admitted, to exempt it from general confiscation."

So much of the cargo of the Peterhoff, therefore, as actually belonged to the owner of the artillery harness, and the other contraband goods, must be also condemned. . .

NOTE.—The practice of nations with regard to the subject of contraband has been a fruitful source of controversy between belligerents and neutrals, for on this subject their interests are in direct opposition. Changes in methods of warfare necessarily lead to the extension of the lists of contraband goods, and such extensions are usually opposed by neutrals as an invasion of their rights. An international agreement as to what shall be treated as contraband, similar to that embodied in the Declaration of London, is much to be desired. Such an agreement, however, if it is to be successful, must be in closer accord with the actual methods of war than is the Declaration of London, which for instance provides that raw cotton and rubber, both of which are extensively used in war, shall never be declared contraband. As the Declaration of London was not ratified, it was not binding on the parties to the Great War and many of the articles enumerated in the free list of the Declaration have been included in the lists of contraband issued by the belligerents.

The cases dealing with the question as to whether particular articles are contraband are legion. Among the many decisions the following may be noted: The Staadt Embden (1798), 1 C. Robinson, 26, The Charlotte (1804), 5 Ib. 305 (masts); The Jonge Tobias (1799), 1 Ib. 329, The Maria (1799), 1 Ib. 340, The Twee Juffrowen (1802), 4 Ib. 242, The Schooner Bird (1903), 38 Ct. Cl. 228 (pitch and tar); The Neptunus (1800), 3 Ib. 108 (cordage and sail cloth); The Endraught (1798), 1 Ib. 22, The Twende Brodre (1801), 4 Ib. 33 (spars, rudders and ship timbers); The Ringende Jacob (1798), 1 Ib. 89, The Gesellschaft Michael (1802), 4 Ib. 94, The Apollo (1802), 4 Ib. 158, The Evert (1803), 4 Ib. 354 (hemp); The Charlotte (1804), 5 Ib. 305 (copper for the sheathing of vessels); The Richmond (1804), 5 Ib. 325 (a ship so

constructed as to be convertible into a privateer); The International (1871), 3 L. R. Ad. & Eccl. 321 (telegraph cables); The Bermuda (1866), 3 Wallace, 514 (printing presses, paper, and postage stamps); United States v. Diekelman (1876), 92 U. S. 520 (money, silver plate, bullion); The Styria v. Morgan (1902), 186 U. S. 1 (sulphur); The Schooner Atlantic (1901), 37 Ct. Cl. 17, (1904), 39 Ib. 193, The Brig Juno (1903), 38 Ib. 465, The Brig Rensalaer (1913), 49 Ib. 1 (horses).

Attempts to declare foodstuffs contraband have provoked sharp controversies. There are only three instances in which provisions have been treated as absolute contraband—in the early part of the Napoleonic wars; in the war between France and China in 1885, when France declared rice absolute contraband; and in 1905, when Russia made a similar declaration. For an account of the protests against the declarations of France and Russia, see Moore, *Digest,* VII, sec. 1253. For the practice of Russia and Japan as to contraband in the war between those two Powers, see Smith and Sibley, ch. xiii; Hershey, *The International Law and Diplomacy of the Russo-Japanese War,* and Cobbett, *Cases and Opinions,* II, 432. For the contraband lists of the Declaration of London, see Wilson, *Handbook,* 576, and Hershey, *Essentials,* 489. For the lists adopted at various times by various countries, see Moore, *Digest,* VII, sec. 1251. For the lists of the Allies in the Great War, see Pyke, *The Law of Contraband of War,* Appendix C.

Some of the most important cases discussing the question of food as contraband are The Jonge Margaretha (1799), 1 C. Robinson, 189; The Edward (1801), 4 Ib. 68; The Commercen (1816), 1 Wheaton, 382; Hooper, Adm., v. United States (1887), 22 Ct. Cl. 408; The Brig Sally (1915), 50 Ib. 129. In the discussion between the British and American governments growing out of the seizure of the Mashona and other vessels in the Boer war, the Marquis of Salisbury said:

> Foodstuffs with a hostile destination can be considered contraband of war only if they are supplies for the enemy's forces. It is not sufficient that they are capable of being so used. It must be shown that this was in fact their destination at the time of seizure.
>
> Moore, *Digest,* VII, 685.

As to the reason for according to belligerents the right to seize contraband on the way to the enemy, a high tribunal has said:

> The transportation of contraband articles to one of the belligerents is in itself an assault for the time being upon the other belligerents, in the fact that it may furnish them with the weapons of war and thereby increase the resources of their power as against their adversary; and for that reason, upon the broad ground of self-preservation incident to nations as well as individuals, the parties against whom the quasi assault is made have the right to defend themselves against the threatened blow by seizing the weapon before it reaches the possession and control of their enemy. The seizure of contraband is not only punishment, but it is also prevention, and the paramount purpose of its exercise is prevention, just as in self-defense on the part of persons it is to protect; but

when the act is accomplished, the damage suffered, and the danger passed, then the incidents of self-defense cease. The extent to which the right to seize may be carried in its effect upon other property belonging to the offending party depends upon a variety of circumstances and conditions. The effect of the seizure may be confined to the contraband articles alone, but may extend beyond those to other property of the guilty party by way of punishment incident to the wrong of carrying contraband.

The Sloop Ralph (1904), 39 Ct. Cl. 204, 207-208.

An excellent treatment of the subject of contraband is Pyke, *The Law of Contraband of War.* See also Atherley-Jones, ch. i; Bentwich, *The Declaration of London;* Bentwich, *War and Private Property,* chs. viii, ix; Bonfils (Fauchille), 994; Kleen, *De la Contrebande de Guerre; Int. Law Topics, 1905,* 21; *Int. Law Situations, 1911,* 99, 111; Moore, *Digest,* VII, ch. xxvi; Westlake, II, ch. x; Wilson, *Handbook,* ch. xxiv; Randall, "History of the Law of Contraband of War," *Law Quar. Rev.,* XXIV, 316, 449; Garner, "Some Questions of International Law in the European War," *Am. Jour. Int. Law,* IX, 372.

Section 2. Contraband Persons.

YANGTSZE INSURANCE ASSOCIATION v. INDEMNITY MUTUAL MARINE ASSURANCE COMPANY.

King's Bench Division of the High Court of Justice of Great Britain.
1908.
Law Reports [1908] 1 K. B. 910.

[In the course of the war between Russia and Japan, the plaintiff underwrote a policy of insurance for £18,000 on the steamer Nigretia, and reinsured a part of their risk by a policy for £15,000 underwritten by the defendant. Both policies provided "warranted no contraband of war." The Nigretia, while carrying two Russian naval officers who had assumed German names, was captured by a Japanese cruiser and condemned by the Prize Court of Sasebo on the ground that it was "transporting contraband persons." The plaintiffs paid or compounded on the original policy as a total loss and then brought action against the defendant for indemnification on the policy of reinsurance. The defendant pleaded that the transportation of the Russian naval officers was a breach of the proviso "warranted no contraband of war."]

Bigham, J. read the following judgment:

This is an action brought on a policy of marine insurance effected by the plaintiffs with the defendants, which contained a

warranty "no contraband of war." The only question to be determined is whether the defendants have proved a breach of the warranty so as to relieve them from liability. (The learned judge then stated the facts as above set out, and proceeded as follows:—) The defendants say they are not liable, because there has been a breach of the warranty "no contraband of war on basis of cable dated 31 October, 1904"; and the question resolves itself into this: Are contraband persons contraband of war within the meaning of the warranty? I am of opinion that they are not. "Contraband of war" is an expression which in ordinary language is used to describe certain classes of material, and does not cover human beings. Many text-writers on international law have no doubt used the expression "contraband persons," but I think I am right in saying that such words are not to be found in any English case, and certainly not in such connection as to shew that they describe a class of contraband of war. The most recent text-writers treat persons as outside any accepted definition of contraband. The transport of "contraband persons" may no doubt in some cases involve the same consequences to the ship as the carriage of contraband, but so may other acts on the part of the ship, as, for instance, transmitting information to the enemy. It would in my opinion be wrong to say that, because the same results may follow in the one case as in the other, therefore the two cases are identical and may be covered by one definition. The Japanese Court carefully avoided describing these officials as contraband of war, and used the somewhat novel, but for their purpose sufficient, expression "contraband persons." The view which I take of this matter is well expressed in the 5th edition of the late Mr. Hall's Treatise on International Law at p. 673, where he says: "With the transport of contraband merchandise is usually classed analogically that of despatches bearing on the conduct of the war, and of persons in the service of a belligerent. It is, however, more correct and not less convenient to place adventures of this kind under a distinct head, the analogy which they possess to the carriage of articles contraband of war being always remote. They differ from it in some cases by involving an intimacy of connection with the belligerent which cannot be inferred from the mere transport of contraband of war, and in others by implying a purely accidental and almost involuntary association with him. They are invariably something distinctly more or something distinctly less than the transport of contraband amounts to. When they are of the former character they may be under-

taken for profit alone, but they are not in the way of mere trade. The neutral individual is not only taking his goods for sale to the best market, irrespectively of the effect which their sale to a particular customer may have on the issue of the war, but he makes a specific bargain to carry despatches or persons in the service of the belligerent for belligerent purposes; he thus personally enters the service of the belligerent, he contracts as a servant to perform acts intended to affect the issue of the war, he makes himself in effect the enemy of the other belligerent. In doing so he does not compromise the neutrality of his own sovereign, because the non-neutral acts are either as a matter of fact done beyond the territorial jurisdiction of the latter, or if initiated within it, as sometimes is the case in carrying despatches, they are of too secret a nature to be, as a general rule, known or prevented. Hence the belligerent is allowed to protect himself by means analogous to those which he uses in the suppression of contraband trade. He stops the trade by force, and inflicts a penalty on the neutral individuals. The real analogy between carriage of contraband and acts of the kind in question lies not in the nature of the acts, but in the nature of the remedy applicable in respect of them. When the acts done are of the second kind, the belligerent has no right to look upon them as being otherwise than innocent in intention. . . . When . . . a neutral in the way of his ordinary business holds himself out as a common carrier, willing to transport everybody who may come to him for a certain sum of money from one specified place to another, he cannot be supposed to identify himself specially with belligerent persons in the service of the state who take passage with him." A little further on, at p. 682, when examining the terms of the despatches which passed between Great Britain and the United States of America in connection with the Trent case, Mr. Hall points out that, whereas Admiralty Courts have power to try claims to contraband goods, they have no power to try claims concerning contraband persons; and he adds: "To say that Admiralty Courts have no means of rendering a judgment in favour of or against persons alleged to be contraband, or of determining what disposition is to be made of them, is to say that persons have not been treated as contraband. If they are contraband the courts must have power to deal with them."

I agree that my interpretation makes it difficult to say to what the warranty would apply, having regard to the fact that the policy already contained a warranty that the cargo should

consist of kerosene only; but this difficulty ought not, in my opinion, to induce me to depart from what I am satisfied is the plain meaning of the words, and the sense in which they are always understood among underwriters and merchants.

Judgment for the plaintiffs.

NOTE.—The term contraband persons is open to serious objections, but nevertheless it is employed by some writers of repute. See Phillimore (3rd Ed.), III, 459; Creasy, *First Platform of International Law*, 631; Bluntschli, secs. 815-817; Calvo (2nd Ed.), II, 494. The overwhelming weight of authority, however, confines the term contraband to goods. The most notable controversy in which the question was involved was that which grew out of the stopping of the British steamer Trent and the removal therefrom of the Confederate commissioners Mason and Slidell. The act was unwarranted, but Secretary Seward attempted to justify it by arguing that the commissioners were analogous to military and naval officers and hence subject to capture. He ordered their release on the ground that the captain had not followed the proper procedure for determining the validity of his capture. See Harris, *The Trent Affair*, and Moore, *Digest*, VII, 626, 768. For General Butler's application of the term contraband to the slaves who took refuge in his camp, see *Butler's Book*, 259.

SECTION 3. PENALTY FOR THE CARRIAGE OF CONTRABAND.

THE NEUTRALITET.

HIGH COURT OF ADMIRALTY OF GREAT BRITAIN. 1801.
3 C. Robinson, 295.

This was a case of a Danish ship taken with a cargo of tar on a voyage from Archangel to Dordrecht. The ship had been a Dutch vessel, and was asserted to have been purchased by Mr. Schultz, of Altona. She then went from Holland to Altona, and was from thence sent on to Archangel, to carry a cargo to Dordrecht, under a charter party made by the asserted owner.

Judgment,—Sir W. SCOTT [LORD STOWELL]—The modern rule of the law of nations is, certainly, that the ship shall not be subject to condemnation for carrying contraband articles. The ancient practice was otherwise, and it cannot be denied, that it was perfectly defensible on every principle of justice. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent. The policy of modern times has however introduced a relaxation on

this point; and the general rule now is, that the vessel does not become confiscable for that act: but this rule is liable to exceptions:—Where a ship belongs to the owner of the cargo, or where the ship is going on such service, under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one. The circumstances of the present case compose a case of exception also; for it is a case of singular misconduct on the part of the asserted ship owners. They are subjects of Denmark, and as such are under the peculiar obligations of a treaty not to carry goods of this nature for the use of the enemies of Great Britain.

A reference has been made to ancient cases of Dantzick ships, which were restored, though taken carrying masts to Cadiz. The particulars of those cases are not very exactly stated; but they were clearly the cases of proprietors exporting the produce of their own territory or neighboring ports, without the breach of any obligation but such as the general law of nations imposed.

In this instance the ship was freighted at Altona, to go to Archangel, for the purpose of carrying a cargo of tar to Holland, which is a commerce expressly prohibited by the Danish treaty. Tar is an article which a Danish ship cannot lawfully carry to an enemy's port, even when it is the produce and manufacture of Denmark. This ship goes to a foreign port, to effect that which she is prohibited from doing, even for the produce of her own country: in this respect, throwing off the character of a Danish ship by violating the treaties of her country; and all this is done, with the full privity of the asserted owner, who is the person entering into the charter party. In such a case as the present, the known ground on which the relaxation was introduced, the supposition that freights of noxious or doubtful articles might be taken, without the personal knowledge of the owner entirely fails; and the active guilt of the parties is aggravated by the circumstances, of its being a criminal traffick in foreign commodities, and in breach of explicit and special obligations. The confiscation of a ship so engaged, will leave the general rule still untouched, that the carriage of contraband works a forfeiture of freight and expenses, but not of the ship. *Ship condemned.*

NOTE.—Compare The Hakan (1916), 2 Br. & Col. P. C. 210,—an admirable examination by Sir Samuel Evans of the practice of nations with regard to ships carrying contraband.

THE HAABET.

HIGH COURT OF ADMIRALTY OF GREAT BRITAIN. 1800.
2 C. Robinson, 174.

This was a case arising on an objection to a report of the registrar and merchants respecting the allowance of insurance, as part of the price of a cargo of wheat, going from Altona to Cadiz, but seized and brought into this country, and bought by Government. The demand of the claimant, Mr. Peschie of Copenhagen, had been disallowed in the report, on the ground that the insurance had not actually been made. . . .

SIR WM. SCOTT [LORD STOWELL]. . . . The question is, Whether there is any reasonable ground for me to pronounce that the Registrar and merchants have disallowed a just demand, in disallowing a charge of insurance which had not been made. It has been argued that this charge ought to have been allowed, because it is usually so allowed in the dealings of merchants with each other; I am not clear that this is a necessary consequence, for it is surely no certain rule that in all cases where a cargo is taken *jure belli* but for the mere purpose of preemption, that it is to receive a price calculated exactly in the same manner, and amounting precisely to the same value, as it would have done, if it had arrived at its port of destination in the ordinary course of trade.

The right of taking possession of cargoes of this description, *Commeatus* or Provisions, going to the enemy's ports, is no peculiar claim of this country; it belongs generally to belligerent nations; the ancient practice of Europe, or at least of several maritime states of Europe, was to confiscate them entirely; a century has not elapsed since this claim has been asserted by some of them. A more mitigated practice has prevailed in later times of holding such cargoes subject only to a right of pre-emption, that is, to a right of purchase upon a reasonable compensation to the individual whose property is thus diverted. I have never understood that, on the side of the belligerent, this claim goes beyond the case of cargoes avowedly bound to the enemy's ports, or suspected, on just grounds, to have a concealed destination of that kind; or that on the side of the neutral, the same exact compensation is to be expected, which he might have demanded from the enemy in his own port; the enemy may be distressed by famine, and may be driven by his necessities to pay a famine price for the commodity if it gets there; it does not fol-

low that acting upon my rights of war in intercepting such supplies, I am under the obligation of paying that price of distress. It is a mitigated exercise of war on which my purchase is made, and no rule has established, that such a purchase shall be regulated exactly upon the same terms of profit, which would have followed the adventure, if no such exercise of war had intervened; it is a reasonable indemnification and a fair profit on the commodity that is due, reference being had to the original price actually paid by the exporter, and the expenses which he has incurred. As to what is to be deemed a reasonable indemnification and profit, I hope and trust that this country will never be found backward in giving a liberal interpretation to these terms; but certainly the capturing nation does not always take these cargoes on the same terms on which an enemy would be content to purchase them; much less are cases of this kind to be considered as cases of costs and damages, in which all loss of possible profit is to be laid upon unjust captors; for these are not unjust captures, but authorized exercises of the rights of war. . . .

Upon the whole, I see no sufficient reason to pronounce that the Registrar and merchants have adopted a wrong measure of value in disallowing the charge of insurance. . . . Report confirmed.

NOTE.—In the Sarah Christina (1799), 1 C. Robinson, 237, 241, which was the case of a Swedish ship carrying pitch and tar to France, Lord Stowell said:

> In the practice of this Court there is a relaxation, which allows the carrying of these articles, being the produce of the claimant's country; as it has been deemed a harsh exercise of a belligerent right, to prohibit the carriage of these articles, which constitute so considerable a part of its native produce and ordinary commerce.—But in the same practice, this relaxation is understood with a condition, that it may be brought in, not for confiscation, but for pre-emption—no unfair compromise, as it should seem, between the belligerent's rights, founded on the necessities of self-defence, and the claims of the neutral to export his native commodities, though immediately subservient to the purposes of hostility.—To entitle the party to the benefit of this rule, a perfect *bona fides* on his part is required.

See also The Edward (1801), 4 C. Robinson, 68. In the Great War of 1914, Great Britain has freely applied the milder practice of pre-emption and paid for many cargoes which the strict law would have justified her in confiscating. See Phillipson, *International Law and the Great War*, 338; Pyke, The *Law of Contraband of War*, 224.

Goods of neutrals in the custody of a prize court for adjudication may under certain conditions be requisitioned. This right was asserted in The

Memphis (1862), Blatchford, 202; The Ella Warley (1862), Ib. 204; The Stephen Hart (1863), Ib. 387. British prize courts have passed upon the question in only two cases,—The Curlew, The Magnet (Nova Scotia, 1812), Stewart, 312, and The Zamora (1916), L. R. [1916], 2 A. C. 77. The latter is the best discussion of the subject in the books, and the conclusion of the Privy Council is thus stated:

> A belligerent Power has by international law the right to requisition vessels or goods in the custody of its Prize Court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. First, the vessel or goods in question must be urgently required for use in connection with the defence of the realm, the prosecution of the war, or other matters involving national security. Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. And, thirdly, the right must be enforced by application to the Prize Court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable.

EDWARD CARRINGTON AND OTHERS v. THE MERCHANTS' INSURANCE COMPANY.

SUPREME COURT OF THE UNITED STATES. 1834.
8 Peters, 495.

[In November, 1824, while open hostilities existed between Spain and the new governments of Chili and Peru, the defendants underwrote a policy of insurance for the plaintiffs covering property of the latter on board the ship General Carrington. The policy, which ran for twelve months from June 5, 1824, was against the usual perils, and contained this clause: "It is also agreed that the assurers shall not be answerable for any charge, damage or loss which may arise in consequence of seizure or detention, for or on account of illicit or prohibited trade, or trade in articles contraband of war." The ship sailed from Providence, Rhode Island, cleared for the Sandwich Islands and Canton, but was immediately bound for Valparaiso, Chili, which port she was to enter under a plea of want of water, with such ulterior destination as was stated in her orders. This was the usual mode of clearance at that time for ships bound to Chili and Peru. The vessel carried a large amount of munitions of war in her cargo, the most of which were disposed of at Valparaiso before the policy of insurance had attached. The vessel then proceeded to Quilca, Peru, where she was seized by the Spanish

authorities and condemned for trading in contraband of war at Valparaiso. The question at issue is the liability of the insurance company under the policy. The Circuit Court being divided in opinion certified certain questions to the Supreme Court for a final decision thereon.]

Mr. Justice Story delivered the opinion of the court. . . .

The second question is, whether, assuming the other facts to be as stated and alleged above, and taking the authority of the seizing vessel to be such as the plaintiffs allege (that is to say, of an armed vessel, fitted out and commissioned at Callao by Rodil [military commander]), there was a legal and justifiable cause for the seizure of the General Carrington and her cargo. The third is precisely the same in terms, except taking the authority of the armed vessel to be such as the defendants allege (that is to say, to be an armed vessel sailing under the royal Spanish flag, and acting by the royal authority of Spain).

Both these questions present the same general point, whether there was, under the circumstances of the case, a legal and justifiable cause of the seizure and detention of the ship and her cargo. The facts material to be taken into consideration in ascertaining this point are, that the ship, when seized, had not landed all her outward cargo, but was still in the progress of the outward voyage originally designated by the owners; that she sailed on that voyage from Providence with contraband articles on board, belonging, with the other parts of the cargo, to the owners of the ship, with a false destination and false papers, which yet accompanied the vessel; that the contraband articles had been landed, before the policy, which is a policy on time, designating no particular voyage, had attached; that the underwriters, though taking no risks within the exception, were not ignorant of the nature and objects of the voyage; and that the alleged cause of the seizure and detention was, the trade in articles contraband of war by the landing of the powder and muskets already mentioned.

If by the principles of the law of nations there existed under these circumstances, a right to seize and detain the ship and her remaining cargo, and to subject them to adjudication for a supposed forfeiture, notwithstanding the prior deposit of the contraband goods; then the question must be answered in the affirmative, that there was a legal and justifiable cause.

According to the modern law of nations, for there has been some relaxation in practice from the strictness of the ancient rules, the carriage of contraband goods to the enemy, subjects

them, if captured, *in delicto,* to the penalty of confiscation; but the vessel and the remaining cargo, if they do not belong to the owner of the contraband goods, are not subject to the same penalty. The penalty is applied to the latter, only when there has been some actual co-operation, on their part, in a meditated fraud upon the belligerents, by covering up the voyage under false papers, and with a false destination. This is the general doctrine when the capture is made *in transitu,* while the contraband goods are yet on board. But when the contraband goods have been deposited at the port of destination, and the subsequent voyage has thus been disconnected with the noxious articles, it has not been usual to apply the penalty to the ship or cargo upon the return voyage, although the latter may be the proceeds of the contraband. And the same rule would seem, by analogy, to apply to cases where the contraband articles have been deposited at an intermediate port on the outward voyage, and before it had terminated; although there is not any authority directly in point. But in the highest prize courts of England, while the distinction between the outward and homeward voyage is admitted to govern, yet it is established, that it exists only in favour of neutrals, who conduct themselves with fairness and good faith in the arrangements of the voyage. If, with a view to practice a fraud upon the belligerent, and to escape from his acknowledged right of capture and detention, the voyage is disguised, and the vessel sails under false papers, and with a false destination, the mere deposit of the contraband in the course of the voyage, is not allowed to purge away the guilt of the fraudulent conduct of the neutral. In the case of the Franklin, in 1801, 3 Rob. 217, Lord Stowell said, "I have deliberated upon this case, and desire it to be considered as the settled rule of law received by this court, that the carriage of contraband with a false destination, will make a condemnation of the ship, as well as the cargo." Shortly afterwards, in the case of the Neutralitet, 1801, 3 Rob. R. 295, he added, "The modern rule of the law of nations is certainly, that the ship shall not be subject to condemnation for carrying contraband goods. The ancient practice was otherwise; and it cannot be denied that it was perfectly justifiable in principle. If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in affecting that illegal purpose, cannot be innocent. The policy of modern times has, however, introduced a relaxation on this point; and the general rule now is, that the vessel does not become confiscated for that

act. But this rule is liable to exceptions. Where a ship belongs to the owner of the cargo, or where the ship is going on such service under a false destination or false papers; these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient rule." The cases in which this language was used were cases of capture upon the outward voyage. (See also the Edward, 4 Rob. R. 68.) The same doctrine was afterwards held by the same learned judge to apply to cases, where the vessel had sailed with false papers, and a false destination upon the outward voyage, and was captured on the return voyage. (See the Nancy, 3 Rob. 122; the Christianberg, 6 Rob. 376.) And, finally, in the cases of The Rosalia and the Elizabeth, in 1802, (4 Rob. R., note to table of cases,) the lords of appeal in prize cases held, that the carriage of contraband outward with false papers will affect the return cargo with condemnation. These cases are not reported at large. But in the case of the Baltic, 1 Acton's R. 25, and that of the Margaret, 1 Acton's R. 333, the lords of appeal deliberately reaffirmed the same doctrine. In the latter case sir William Grant, in pronouncing the judgment of the court said: "The principle upon which this and other prize courts have generally proceeded to adjudication in cases of this nature (that is, where there are false papers), appears simply to be this; that if a vessel carried contraband on the outward voyage, she is liable to condemnation on the homeward voyage. It is by no means necessary that the cargo should have been purchased by the proceeds of this contraband. Hence we must pronounce against this appeal; the sentence (of condemnation) of the court below being perfectly valid and consistent with the acknowledged principles of general law."

We cannot but consider these decisions as very high evidence of the law of nations, as actually administered; and in their actual application to the circumstances of the present case, they are not, in our judgment, controlled by any opposing authority. Upon principle, too, we think, that there is great soundness in the doctrine, as a reasonable interpretation of the law of nations. The belligerent has a right to require a frank and *bona fide* conduct on the part of neutrals in the course of their commerce in times of war; and if the latter will make use of fraud, and false papers, to elude the just rights of the belligerents, and to cloak their own illegal purposes, there is no injustice in applying to them the penalty of confiscation. The taint of the fraud travels with the party and his offending instrument during the whole

course of the voyage, and until the enterprise has, in the understanding of the party himself, completely terminated. There are many analogous cases in the prize law, where fraud is followed by similar penalties. Thus, if a neutral will cover up enemy's property under false papers, which also cover his own property, prize courts will not disentangle the one from the other, but condemn the whole as good prize. That doctrine was solemnly affirmed in this court, in the case of the St. Nicholas, 1 Wheaton, 417, 3 Cond. Rep. 614.

Upon the whole, our opinion is, that the general question involved in the second and third questions, whether there was a legal and justifiable cause of capture under the circumstances of the present case, ought to be answered in the affirmative. The question, as to the authority of the cruiser to seize, so far as it depends upon her commission, can only be answered in a general way. If she had a commission under the royal authority of Spain, she was beyond question entitled to make the seizure. If Rodil had due authority to grant the commission, the same result would arise. If he had no such authority, then she must be treated as a non-commissioned cruiser entitled to seize for the benefit of the crown; whose acts, if adopted and acknowledged by the crown or its competent authorities, become equally binding. Nothing is better settled both in England and America, than the doctrine that a non-commissioned cruiser may seize for the benefit of the government; and if his acts are adopted by the government, the property, when condemned, becames a *droit* of the government. (The Amiable Isabella, 6 Wheat. Rep. 1, 5 Cond. Rep. 1; The Dos Hermanos, 10 Wheat. Rep. 306, 6 Cond. Rep. 109; The Melomane, 5 Rob. 41; The Elsebe, 5 Rob. 174; The Maria Françoise, 6 Rob. 282.) . . .

NOTE.—The penalties for engaging in contraband traffic vary with the relationship between the cargo and the vessel in which it is found. In no case however do they extend beyond the total loss of both goods and vessel. If the two are the property of the same owner, both may be confiscated, The Staadt Embden (1798), 1 C. Robinson, 26. If the two are the property of different owners, usually the cargo alone is confiscated, while the vessel itself is only seized and detained and its loss is confined to freight, The Ringende Jacob (1798), 1 C. Robinson, 90; The Sarah Christina (1799), 1 Ib. 237; The Eenrom (1799), 2 Ib. 1; The Bermuda (1866), 3 Wallace, 514. But the utmost good faith is required and any deception, The Jonge Tobias (1799), 1 C. Robinson, 329; The Franklin (1801), 3 Ib. 217; The Caroline (1802), 4 Ib. 256; The Ranger (1805), 6 Ib. 125; The Schooner Betsey and Polly (1902), 38 Ct. Cl. 30; The Bawtry (1904), Takahashi, 659, or spoliation of documents, The Johanna Emilie (1854), Spinks, 12; The Ophelia (1915), L. R. [1915] P. 129, may lead to the

confiscation of the vessel. Takahashi reports nine cases in which the Japanese Prize Courts condemned vessels for the carriage of contraband. In many of them the court adopts the eighteenth-century principle that the carriage of contraband exposes the vessels to condemnation. An examination of the facts however shows that in each case the vessel concerned had practiced some form of deception, and the sentence may be sustained on that ground. See Takahashi, 651-709. A vessel's liability to seizure for the carriage of contraband usually terminates with the deposit of the contraband cargo, The Frederick Molke (1798), 1 C. Robinson 86; The Sloop Ralph (1904), 39 Ct. Cl. 204, unless the voyage has been accomplished by means of false or simulated papers, The Nancy (1800), 3 C. Robinson, 122; The Lucy (1904), 39 Ct. Cl. 221; The Betsey (1904), 39 Ib. 452; The Alwina (1916), L. R. [1916] P. 131, when on the return voyage both the ship and the cargo purchased with the proceeds of the contraband cargo were held liable to capture. On the penalty for carrying contraband, see Pyke, *The Law of Contraband of War*, ch. xvi; Moore, *Digest*, VII, 744, and The Hakan (1916), 2 Br. & Col. P. C. 210, where the authorities are fully reviewed.

Section 4. The Doctrine of Continuous Voyage or Enemy Destination.

THE WILLIAM.

Lords Commissioners of Appeal in Prize Causes of Great Britain.
1806.
5 C. Robinson, 385.

This was a question on the continuity of a voyage in the colonial trade of the enemy, brought by appeal from the Vice Admiralty Court at Halifax, where the ship and cargo, taken on a destination to Bilboa in Spain, and claimed on behalf of Messrs. W. and N. Hooper of Marblehead in the state of Massachusetts, had been condemned 17th July, 1800.

It appeared in evidence, that the ship had gone to Martinique, where the outward cargo was disposed of; that she then proceeded to La Guira, and took on board a cargo of cocoa, the property of the owners, which was brought to Marblehead on the 29th May, and unladen; that the ship was then cleaned and slightly repaired, and again took on board the chief part of the former cargo, . . . and sailed on or before the 7th June, upon a destination to Bilboa. Among the papers was a certificate from the collector of the customs, "that this vessel had entered and landed a cargo of cocoa belonging to Messrs. W. and N. Hooper, and that the duties had been secured agreeable to law, and that the said cargo had been re-shipped on board this vessel bound for Bilboa." . . .

Sir WILLIAM GRANT—The question in this case is, whether that part of the cargo which has been the subject of further proof, and which, it is admitted, was at the time of the capture, going to Spain, is to be considered as coming directly from Laguira within the meaning of his Majesty's instructions. According to our understanding of the law, it is only from those instructions that neutrals derive any right of carrying on with the colonies of our enemies, in time of war, a trade from which they were excluded in time of peace. The instructions had not permitted the direct trade between the hostile colony and its mother country, but had, on the contrary ordered all vessels engaged in it to be brought in for lawful adjudication; and what the present claimants accordingly maintain, is not that they could carry the produce of Laguira directly to Spain; but that they were not so carrying the cargo in question, inasmuch as the voyage in which it was taken was a voyage from North America, and not directly from a colony of Spain.

What then, with reference to this subject, is to be considered as a direct voyage from one place to another? Nobody has ever supposed that a mere deviation from the straightest and shortest course, in which the voyage could be performed, would change its denomination, and make it cease to be a direct one within the intendment of the instructions. Nothing can depend on the degree or the direction of deviation—whether it be of more or fewer leagues, whether towards the coast of Africa, or towards that of America. Neither will it be contended that the point from which the commencement of a voyage is to be reckoned changes as often as the ship stops in the course of it; nor will it the more change, because a party may choose arbitrarily by the ship's papers or otherwise to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore, and from the shore back again into the ship, does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done: Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo

purely and solely for the purpose of enabling himself to affirm, that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of having begun from a different place? The truth may not always be discernible, but when it is discovered, it is according to the truth and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended. That those acts have been attended with trouble and expense cannot alter their quality or their effect. The trouble and expense may weigh as circumstances of evidence, to shew the purpose for which the acts were done; but if the evasive purpose be admitted or proved, we can never be found to accept as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended, and the colourable importation which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same; but there is this difference between them.—The landing of the cargo, the entry at the custom-house, *are necessary ingredients* in a genuine importation; the true purpose of the owner cannot be effected without them. But in a fictitious importation they are *mere voluntary ceremonies*, which have no natural connection whatever with the purpose of sending on the cargo to another market, and which, therefore, would never be resorted to by a person entertaining that purpose, except with a view of giving to the voyage which he has resolved to continue, the appearance of being broken by an importation, which he has resolved not really to make.

Now, what is the case immediately before us? The cargo in question was taken on board at Laguira. It was at the time of the capture proceeding to Spain; but the ship had touched at an American port. The cargo was landed and entered at the custom-house, and a bond was given for the duties to the amount of 1,239 dollars. The cargo was re-shipped, and a debenture for 1,211 dollars by way of drawback was obtained. All this passed in the course of a few days. The vessel arrived at Marblehead on the 29th of May; on that day the bond for se-

curing the duties was given. On the 30th and 31st the goods were landed, weighed, and packed. The permit to ship them is dated the 1st of June, and on the 3d of June the vessel is cleared out as laden, and ready to proceed to sea. We are frequently obliged to collect the purpose from the circumstances of the transaction. The landing thus almost instantaneously followed by the re-shipment, has little appearance of having been made with a view to actual importation; but it is not upon inference that the conclusion in this case is left to rest. The claimants instead of shewing that they really did import their cargo, have, in their attestation, stated the reasons which determined them not to import it. They say, indeed, that when they ordered it to be purchased, "it was with the single view of bringing it to the United States, and that they had no intention or expectation of exporting it in the *said schooner* to Spain." Supposing that from this somewhat ambiguous statement we are to collect that their original intention was to have imported this cargo into America, with a view only to the American market, yet their intention had been changed before the arrival of the vessel. For they state that *in the beginning of May* they had received accounts of the prices of cocoa in Spain, which satisfied them that it would sell much better there than in America, and that they had therefore determined to send it to the Spanish market. Nothing is alleged to have happened between the landing of the cargo and its re-shipment, that could have had the least influence on their determination. It was not in that short interval that American prices fell, or that information of the higher prices in Spain had been received. Knowing beforehand the comparative state of the two markets, they neither tried nor meant to try that of America, but proceeded with all possible expedition to go through the forms which have been before enumerated. If the continuity of the voyage remains unbroken, it is immaterial whether it be by the prosecution of an original purpose to continue it, as in the case of the Essex, or, as in this case, by the relinquishment of an original purpose to have brought it to a termination in America. It can never be contended, that an intention to import once entertained is equivalent to importation. And it would be a contradiction in terms to say that by acts done after their original intention has been abandoned, such original intention has been carried into execution. Why should a cargo, which there was to be no attempt to sell in America, have been entered at an American custom-house,

and voluntarily subjected to the payment of any, even the most trifling duty? Not because an importation was, or in such a case could be intended, but because it was thought expedient that something should be done, which in a British Prize Court might pass for importation. Indeed, the claimants seem to have conceived that the inquiry to be made here was, *not*, whether the importation was real or pretended, but whether the pretence had assumed a particular form, and was accompanied with certain circumstances which by some positive rule were, in all cases, to stand for importation, or to be conclusive evidence of it. . . .

But supposing that we had uniformly held that payment of the import duties furnished conclusive evidence of importation, would there have been any inconsistency or contradiction in holding that the mere act of giving a bond for an amount of duties, of which only a very insignificant part was ever to be paid, could not have the same effect as the actual payment of such amount? The further proof in the Essex first brought distinctly before us the real state of the fact in this particular. It has been already mentioned that we had called for an account of the drawbacks, if any, that had been received. This produced the information that although the duties secured amounted to 5,278 dollars, yet a debenture was immediately afterwards given for no less than 5,080 dollars; so that on that valuable cargo no more than 198 dollars would be ultimately payable, which sum is said to be more than compensated by the advantage arising from the negotiability of the debenture. . . .

The consequence is, that the voyage was illegal, and that the sentence of condemnation must be affirmed.

THE SPRINGBOK.

SUPREME COURT OF THE UNITED STATES. 1866.
5 Wallace, 1.

Appeal from a decree of the District Court of the United States for the Southern District of New York.

[The British boat Springbok, commanded by the son of one of its owners, was chartered in November, 1862, to T. S. Begbie of London to take a cargo of merchandise and therewith "proceed to Nassau, or as near thereunto as she may safely get, and

deliver same." The brokers charged with the lading, acting for Isaac, Campbell & Co., instructed the master in December, 1862, "You will proceed at once to the port of Nassau, N. P., and on arrival report yourself to Mr. B. W. Hart there, who will give you orders as to the delivery of your cargo." By the bills of lading the cargo was made deliverable to order or assigns. The Springbok was captured February 3, 1863 by an American war vessel about 150 miles from Nassau, which it was a matter of common knowledge was then used as a port for the transshipment of cargoes destined for blockaded ports in the Southern States. At the hearing in the District Court evidence introduced in the cases of the Stephen Hart captured January 28, 1863 and the Gertrude captured April 16, 1863, was invoked whereby it appeared that the cargoes in the three vessels consisted in whole or in part of contraband and were owned largely by the same persons. In the case of the Springbok, the District Court condemned both the ship and the cargo.]

The CHIEF JUSTICE [CHASE] delivered the opinion of the court. . . .

We have already held in the case of the Bermuda [(1865), 3 Wallace, 514], where goods, destined ultimately for a belligerent port, are being conveyed between two neutral ports by a neutral ship, under a charter made in good faith for that voyage, and without any fraudulent connection on the part of her owners with the ulterior destination of the goods, that the ship, though liable to seizure in order to the confiscation of the goods, is not liable to condemnation as prize. We think that the Springbok fairly comes within this rule. . . .

The case of the cargo is quite different from that of the ship. . . .

The bills of lading disclosed the contents of six hundred and nineteen, but concealed the contents of thirteen hundred and eighty-eight, of the two thousand and seven packages which made up the cargo. Like those in the Bermuda case they named no consignee, but required the cargo to be delivered to order or assigns. The manifest of the cargo also, like that in the Bermuda case, mentioned no consignee, but described the cargo as delivered to order. Unlike those bills and that manifest, however, these concealed the names of the real owners as well as the contents of more than two-thirds of the packages.

Why were the contents of the packages concealed? The owners knew that they were going to a port in the trade with which

the utmost candor of statement might be reasonably required. The adventure was undertaken several months after the publication of the answer of Earl Russell to the Liverpool shipowners. . . . In that answer the British foreign secretary had spoken of allegations by the American government that ships had been sent from England to America with fixed purpose to run the blockade, and that arms and ammunition had thus been conveyed to the Southern States to aid them in the war; and he had confessed his inability either to deny the allegations or to prosecute the offenders to conviction; and he had then distinctly informed the Liverpool memorialists that he could not be surprised that the cruisers of the United States should watch with vigilance a port which was said to be the great entrepôt of this commerce. For the concealment of the character of a cargo shipped for that entrepôt, after such a warning, no honest reason can be assigned. The true reason must be found in the design of the owners to hide from the scrutiny of the American cruisers the contraband character of a considerable portion of the contents of those packages.

And why were the names of those owners concealed? Can any honest reason be given for that? None has been suggested. But the real motive of concealment appears at once when we learn, from the claim, that Isaac, Campbell & Co., and Begbie were the owners of the cargo of the Springbok, and from the papers involved, that Begbie was the owner of the steamship Gertrude, laden in Nassau in April, 1863, with a cargo corresponding in several respects with that now claimed by him and his associates, and dispatched on a pretended voyage to St. John's, New Brunswick, but captured for unneutral conduct and abandoned to condemnation without even the interposition of a claim in the prize court; and when we learn further from the same papers that Isaac, Campbell & Co., were the sole owners of the cargo of the Stephen Hart, consisting almost wholly of arms and munitions of war, and sent on a pretended destination to Cardenas, but with a real one for the States in rebellion. Clearly the true motive of the concealment must have been the apprehension of the claimants, that the disclosure of their names as owners would lead to the seizure of the ship in order to the condemnation of the cargo.

We are next to ascertain the real destination of the cargo, for their concealments do not, of themselves, warrant condemnation. If the real intention of the owners was that the cargo should be landed at Nassau and incorporated by real sale into the common

stock of the island, it must be restored, notwithstanding this misconduct.

What then was this real intention? That some other destination than Nassau was intended may be inferred, from the fact that the consignment, shown by the bills of lading and the manifest, was to order or assigns. Under the circumstances of this trade, already mentioned, such a consignment must be taken as a negation that any sale had been made to any one in Nassau. It must also be taken as a negation that any such sale was intended to be made there; for had such sale been intended; it is most likely that the goods would have been consigned for that purpose to some established house named in the bills of lading.

This inference is strengthened by the letter of Speyer & Haywood to the master, when about to sail from London. That letter directs him to report to B. W. Hart, the agent of the charterers at Nassau, and receive his instructions as to the delivery of the cargo. The property in it was to remain unchanged upon delivery. The agent was to receive it and execute the instructions of his principals.

What these instructions were may be collected, in part, from the character of the cargo.

A part of it, small in comparison with the whole, consisted of arms and munitions of war, contraband within the narrowest definition. Another and somewhat larger portion consisted of articles useful and necessary in war, and therefore contraband within the construction of the American and English prize courts. These portions being contraband, the residue of the cargo, belonging to the same owners, must share their fate. The Immanuel, 2 Robinson, 196; Carrington v. Merchants' Insurance Co., 8 Peters, 495.

But we do not now refer to the character of the cargo for the purpose of determining whether it was liable to condemnation as contraband, but for the purpose of ascertaining its real destination; for, we repeat, contraband or not, it could not be condemned, if really destined for Nassau and not beyond; and, contraband or not, it must be condemned if destined to any rebel port, for all rebel ports were under blockade.

Looking at the cargo with this view, we find that a part of it was specially fitted for use in the rebel military service, and a larger part, though not so specially fitted, was yet well adapted to such use. Under the first head we include the sixteen dozen swords, and the ten dozen rifle-bayonets, and the forty-five thousand navy buttons [marked "C. S. N."], and the one hundred

and fifty thousand army buttons [marked "A", or "I", or "C,"]; and, under the latter, the seven bales of army cloth and the twenty bales of army blankets and other similar goods. We cannot look at such a cargo as this, and doubt that a considerable portion of it was going to the rebel States, where alone it could be used; nor can we doubt that the whole cargo had one destination.

Now if this cargo was not to be carried to its ultimate destination by the Springbok (and the proof does not warrant us in saying that it was), the plan must have been to send it forward by transshipment. And we think it evident that such was the purpose. We have already referred to the bills of lading, the manifest, and the letter of Speyer & Haywood, as indicating this intention; and the same inference must be drawn from the disclosures by the invocation, that Isaac, Campbell & Co. had before supplied military goods to the rebel authorities by indirect shipment, and that Begbie was owner of the Gertrude and engaged in the business of running the blockade.

If these circumstances were insufficient grounds for a satisfactory conclusion, another might be found in the presence of the Gertrude in the harbor of Nassau with undenied intent to run the blockade, about the time when the arrival of the Springbok was expected there. It seems to us extremely probable that she had been sent to Nassau to await the arrival of the Springbok and to convey her cargo to a belligerent and blockaded port, and that she did not so convey it, only because the voyage was intercepted by the capture.

All these condemnatory circumstances must be taken in connection with the fraudulent concealment attempted in the bills of lading and the manifest, and with the very remarkable fact that not only has no application been made by the claimants for leave to take further proof in order to furnish some explanation of these circumstances, but that no claim, sworn to personally, by either of the claimants, has ever been filed.

Upon the whole case we cannot doubt that the cargo was originally shipped with intent to violate the blockade; that the owners of the cargo intended that it should be transshipped at Nassau into some vessel more likely to succeed in reaching safely a blockaded port than the Springbok: that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing.

The decree of the District Court must, therefore, be reversed as to the ship . . . and must be affirmed as to the cargo. . . .

NOTE.—No other decision of an American prize court, or perhaps of any prize court, has ever been so harshly condemned or so strikingly vindicated as has the decision in The Springbok. The Institute of International Law in 1882 submitted the principles involved to a committee composed of such distinguished jurists as Arntz, Asser, Bulmerincq, Gessner, Hall, De Martens, Pierantoni, Renault, Rolin, and Sir Travers Twiss, and representing most of the great maritime Powers, which denounced the decision as one tending to annihilate neutral trade. Moore, *Digest*, VII, 731. But in 1896 the Institute adopted the principle in this form:

> A destination for the enemy is presumed when the carriage of the goods is directed toward one of his ports or toward a neutral port which by evident proofs arising from incontestable facts is only a stage in a carriage to the enemy as the final object of the same commercial transaction.
>
> *Annuaire de l'Institut de Droit International, 1896*, 231.

It should be noted that those who criticised the decision in The Springbok generally insisted that the cargo was condemned on the *suspicion* that it was to be transshipped to some blockaded port. It would require an unusually credulous mind to believe, in the light of all the evidence, that the cargo could have had any other destination. Furthermore whether the cargo was condemned on suspicion depended on the rules of evidence followed by the court, and not on any principle of international law. The owners of the cargo petitioned the British Government to demand compensation from the American Government for the confiscation of their property. After a careful study of all the papers in the case, the British Government replied that they would not be "justified, on the materials before them, in making any claim" for compensation. Moore, *Digest*, VII, 723. The owners were again defeated when they presented their case to the International Commission provided for by article xiii of the Treaty of Washington, but damages were allowed for the detention of the vessel. Moore, *Int. Arb.* IV, 3928.

THE KIM. THE ALFRED NOBEL.

THE BJORNSTERJNE BJORNSON. THE FRIDLAND.

ADMIRALTY DIVISION (IN PRIZE) OF THE HIGH COURT OF JUSTICE OF GREAT BRITAIN. 1915.
L. R. [1915] P. 215.

The PRESIDENT (SIR SAMUEL EVANS). The cargoes which have been seized, and which are claimed in these proceedings, were laden on four steamships belonging to neutral owners, and

were under time charters to an American corporation, the Gans Steamship Line. . . . The four ships . . . [three Norwegian and one Swedish] all started within a period of three weeks in October and November, 1914, on voyages from New York to Copenhagen with very large cargoes of lard, hog and meat products, oil stocks, wheat and other foodstuffs; two of them had cargoes of rubber and one of hides. They were captured on the high seas, and their cargoes were seized on the ground that they were conditional contraband, alleged to be confiscable in the circumstances, with the exception of one cargo of rubber which was seized as absolute contraband.

The Court is now asked to deal only with the cargoes. All questions relating to the capture and confiscability of the ships are left over to be argued and dealt with hereafter. .. . .

Before proceeding to state the result of the examination of the facts relative to the respective cargoes and claims, a general review may be made of the situation which led up to the dispatch of the four ships with their cargoes to a Danish port.

Notwithstanding the state of war, there was no difficulty in the way of neutral ships trading to German ports in the North Sea, other than the perils which Germany herself had created by the indiscriminate laying and scattering of mines of all description, unanchored and floating outside territorial waters in the open sea in the way of the routes of maritime trade, in defiance of international law and the rules of conduct of naval warfare, and in flagrant violation of the Hague Convention to which Germany was a party. Apart from these dangers, neutral vessels could have, in the exercise of their international right, voyaged with their goods to and from Hamburg, Bremen, Emden, and any other ports of the German Empire. There was no blockade involving risk of confiscation of vessels running or attempting to run it. Neutral vessels might have carried conditional and absolute contraband into those ports, acting again within their rights under international law, subject only to the risk of capture by vigilant warships of this country and its allies. But the trade of neutrals—other than the Scandinavian countries and Holland—with German ports in the North Sea having been rendered so difficult as to become to all intents impossible, it is not surprising that a great part of it should be deflected to Scandinavian ports from which access to the German ports in the Baltic and to inland Germany by overland routes was available, and that this deflection resulted, the facts universally known strongly testify. The neutral trade concerned in the

present cases is that of the United States of America; and the transactions which have to be scrutinized arose from a trading, either real and bona fide, or pretended and ostensible only, with Denmark, in the course of which these vessels' sea voyages were made between New York and Copenhagen.

Denmark is a country with a small population of less than three millions; and is, of course, as regards foodstuffs, an exporting, and not an importing country. Its situation, however, renders it convenient to transport goods from its territory to German ports and places like Hamburg, Altona, Lübeck, Stettin, and Berlin.

The total cargoes in the four captured ships bound for Copenhagen within about three weeks amounted to 73,237,796 lbs. in weight. . . . Portions of these cargoes have been released, and other portions remain unclaimed. The quantity of goods claimed in these proceedings is very large. Altogether the claims cover 32,312,479 lbs. (exclusive of the rubber and hides). The claimants did not supply any information as to the quantities of similar products which they had supplied or consigned to Denmark previous to the war. Some illustrative statistics were given by the Crown, with regard to lard of various qualities, which are not without significance, and which form a fair criterion of the imports of these and like substances into Denmark before the war; and they give a measure for comparison with the imports of lard consigned to Copenhagen after the outbreak of war upon the four vessels now before the Court.

The average annual quantity of lard imported into Denmark during the three years 1911-1913 from all sources was 1,459,000 lbs. The quantity of lard consigned to Copenhagen on these four ships alone was 19,252,000 lbs. Comparing these quantities, the result is that these vessels were carrying towards Copenhagen within less than a month more than thirteen times the quantity of lard which had been imported annually to Denmark for each of the three years before the war.

To illustrate further the change effected by the war, it was given in evidence that the imports of lard from the United States of America to Scandinavia (or, more accurately, to parts of Europe other than the United Kingdom, France, Belgium, Germany, the Netherlands, and Italy) during the months of October and November, 1914, amounted to 50,647,849 lbs. as compared with 854,856 lbs. for the same months in 1913—showing an increase for the two months of 49,792,993 lbs.; or in other

words the imports during those two months in 1914 were nearly sixty times those for the corresponding months of 1913.

One more illustration may be given from statistics which were given in evidence for one of the claimants (Hammond & Co. and Swift & Co.): In the five months August-December, 1913, the exports of lard from the United States of America to Germany were 68,664,975 lbs. During the same five months in 1914 they had fallen to a mere nominal quantity, 23,800 lbs. On the other hand, during those periods, similar exports from the United States of America to Scandinavian countries (including Malta and Gibraltar, which would not materially affect the comparison) rose from 2,125,579 lbs. to 59,694,447 lbs. These facts give practical certainty to the inference that an overwhelming proportion (so overwhelming as to amount to almost the whole) of the consignments of lard in the four vessels we are dealing with was intended for, or would find its way into, Germany. These, however, are general considerations, important to bear in mind in their appropriate place; but not in any sense conclusive upon the serious questions of consecutive voyages, of hostile quality, and of hostile destination, which are involved before it can be determined whether the goods seized are confiscable as prize. . . . [Here follows an elaborate analysis of the facts involved in the cases of the several claimants, in the course of which the learned judge found that the great bulk of the cargoes under consideration had been shipped "to order" or to the shippers' agents.]

With regard to the general character of the cargoes, evidence was given by persons of experience that all the foodstuffs were suitable for the use of troops in the field; that some, e. g., the smoked meat or smoked bacon, were similar in kind, wrapping, and packing to what was supplied in large quantities to the British troops, and were not ordinarily supplied for civilian use; that others, e. g., canned or boiled beef in tins, were of the same brand and class as had been offered by Armour & Co. for the use of the British forces in the field; and that the packages sent by these ships could only have been made up for the use of troops in the field. As against this, there was evidence that goods of the same class had been ordinarily supplied to and for civilians.

As to the lard, proof was given that glycerine (which is in great demand for the manufacture of nitro-glycerine for high explosives) is readily obtainable from lard. Although this use is possible, there was no evidence before me that any lard had

been so used in Germany; and I am of opinion that the lard comprised ought to be treated upon the footing of foodstuffs only. It is largely used in German army rations.

As to the fat backs (of which large quantities were shipped), there was also proof that they could be used for the production of glycerine. . . . In fact no evidence . . . was offered for the shippers of fat backs. Mr. Nuttall, a deponent for one of them . . . says the fat backs shipped by them were not in a condition which was suitable for eating; but he may have meant only that they required further treatment before they became edible.

There was no market for these fat backs in Denmark. The Procurator-General deposed as a result of inquiries that the Germans were very anxious to obtain fat backs merely for the glycerine they contain. In these circumstances it is not by any means clear that fat backs should be regarded merely as foodstuffs in these cases, and in the absence of evidence to the contrary, it is fair to treat them as materials which might either be required as food, or for the production of glycerine.

The convenience of Copenhagen for transporting goods to Germany need hardly be mentioned. It is in evidence that the chief trade between Copenhagen and Germany since the war was through Lübeck, Stettin, and Hamburg.

The sea-borne trade of Lübeck has increased very largely since this war. It was also sworn in evidence that Lübeck was a German naval base. Stettin is a garrison town, and is the headquarters of army corps. It has also shipbuilding yards where warships are constructed and repaired. It is Berlin's nearest seaport. It will be remembered that one of the big shipping companies asked a Danish firm to become nominal consignees for goods destined for Stettin. Hamburg and Altona had ceased to be the commercial ports dealing with commerce coming through the North Sea. They were the headquarters of various regiments. Copenhagen is also a convenient port for communication with the German naval arsenal and fortress of Kiel and its canal, and for all places reached through the canal. These ports may properly be regarded, in my opinion, as bases of supply for the enemy, and the cargoes destined for these might on that short ground be condemned as prize; but I prefer, especially as no particular cargo can definitely be said to be going to a particular port, to deal with the cases upon broader grounds.

Before stating the inferences and conclusions of fact, it will be convenient to investigate and ascertain the legal principles

which are to be applied according to international law, in view of the state of things as they were in the year 1914.

While the guiding principles of the law must be followed, it is a truism to say that international law, in order to be adequate, as well as just, must have regard to the circumstances of the times, including "the circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it:" vide The Jonge Margaretha (1799), 1 C. Rob. 189, and Chancellor Kent's Commentaries, p. 139.

Two important doctrines familiar to international law come prominently forward for consideration: the one is embodied in the rule as to "continuous voyage," or continuous "transportation"; the other relates to the ultimate hostile destination of conditional and absolute contraband respectively.

The doctrine of "continuous voyage," was first applied by the English Prize Courts to unlawful trading. There is no reported case in our Courts where the doctrine is applied in terms to the carriage of contraband; but it was so applied and extended by the United States Courts against this country in the time of the American Civil War; and its application was acceded to by the British Government of the day: and was, moreover, acted upon by the International Commission which sat under the Treaty between this country and America, made at Washington on May 8, 1871, when the commission, composed of an Italian, an American, and a British delegate, unanimously disallowed the claims in The Peterhoff, (1866), 5 Wallace, 28, which was the leading case upon the subject of continuous transportation in relation to contraband goods. . . .

I am not going through the history of it, but the doctrine was asserted by Lord Salisbury at the time of the South African war with reference to German vessels carrying goods to Delagoa Bay, and as he was dealing with Germany, he fortified himself by referring to the view of Bluntschli as the true view as follows: "If the ship or goods are sent to the destination of a neutral port only the better to come to the aid of the enemy, these will be contraband of war, and confiscation will be justified."

It is essential to appreciate that the foundation of the law of contraband, and the reason for the doctrine of continuous voyage which has been grafted into it, is the right of a belligerent to prevent certain goods from reaching the country of the enemy for his military use. Neutral traders, in their own interest, set limits to the exercise of this right as far as they can. These con-

flicting interests of neutrals and belligerents are the causes of the contests which have taken place upon the subject of contraband and continuous voyages.

A compromise was attempted by the London Conference in the unratified Declaration of London. The doctrine of continuous voyage or continuous transportation was conceded to the full by the conference in the case of absolute contraband, and it was expressly declared that "it is immaterial whether the carriage of the goods is direct, or entails transshipment, or a subsequent transport by land."

As to conditional contraband, the attempted compromise was that the doctrine was excluded in the case of conditional contraband, except when the enemy country had no seaboard. As is usual in compromises, there seems to be an absence of logical reason for the exclusion. If it is right that a belligerent should be permitted to capture absolute contraband proceeding by various voyages or transport with an ultimate destination for the enemy territory, why should he not be allowed to capture goods which though not absolutely contraband, become contraband by reason of a further destination to the enemy Government or its armed forces? And with the facilities of transportation by sea and by land which now exist the right of a belligerent to capture conditional contraband would be of a very shadowy value if a mere consignment to a neutral port were sufficient to protect the goods. It appears also to be obvious that in these days of easy transit, if the doctrine of continuous voyage or continuous transportation is to hold at all, it must cover not only voyages from port to port at sea, but also transport by land, until the real, as distinguished from the merely ostensible, destination of the goods is reached.

In connection with this subject, note may be taken of the communication of January 20, 1915, from Mr. Bryan, as Secretary of State for the United States Government, to Mr. Stone, of the Foreign Relations Committee of the Senate. It is, indeed, a State document. In it the Secretary of State, dealing with absolute and conditional contraband, puts on record the following as the views of the United States Government:—

"The rights and interests of belligerents and neutrals are opposed in respect to contraband articles and trade. . . . The record of the United States in the past is not free from criticism. When neutral, this Government has stood for a restricted list of absolute and conditional contraband. As a belig-

erent, we have contended for a liberal list, according to our conception of the necessities of the case.

"The United States has made earnest representations to Great Britain in regard to the seizure and detention of all American ships or cargoes bona fide destined to neutral ports. . . . It will be recalled, however, that American Courts have established various rules bearing on these matters. The rule of 'continuous voyage' has been not only asserted by American tribunals, but extended by them. They have exercised the right to determine from the circumstances whether the ostensible was the real destination. They have held that the shipment of articles of contraband to a neutral port 'to order' [this was of course before the Order in Council of October 29], from which, as a matter of fact, cargoes had been transshipped to the enemy, is corroborative evidence that the cargo is really destined to the enemy instead of to the neutral port of delivery. It is thus seen that some of the doctrines which appear to bear harshly upon neutrals at the present time are analogous to or outgrowths from policies adopted by the United States when it was a belligerent. The Government, therefore, cannot consistently protest against the application of rules which it has followed in the past, unless they have not been practiced as heretofore. . . . The fact that the commerce of the United States is interrupted by Great Britain is consequent upon the superiority of her navy on the high seas. History shows that whenever a country has possessed the superiority our trade has been interrupted, and that few articles essential to the prosecution of the war have been allowed to reach its enemy from this country." . . .

I have no hesitation in pronouncing that, in my view, the doctrine of continuous voyage, or transportation, both in relation to carriage by sea and to carriage over land, had become part of the law of nations at the commencement of the present war, in accordance with the principles of recognized legal decisions, and with the view of the great body of modern jurists, and also with the practice of nations in recent maritime warfare.

The result is that the Court is not restricted in its vision to the primary consignments of the goods in these cases to the neutral port of Copenhagen; but is entitled, and bound, to take a more extended outlook in order to ascertain whether this neutral destination was merely ostensible and, if so, what the real ultimate destination was.

As to the real destination of a cargo, one of the chief tests is whether it was consigned to the neutral port to be there delivered

for the purpose of being imported into the common stock of the country. . . . [The learned judge here cites The William (1806), 5 C. Rob., 385, and The Bermuda, (1865), 3 Wallace, 514.] Another circumstance which has been regarded as important in determining the question of real or ostensible destination at the neutral port was the consignment "to order or assigns" without naming any consignee. In the celebrated case of The Springbok (1866), 5 Wallace, 1, the Supreme Court of the United States acted upon inferences as to destination (in the case of blockade) on this very ground. . . . The same circumstance was also similarly dealt with in The Bermuda (1865), 3 Wallace, 514, and in The Peterhoff, (1866), 5 Wallace, 28.

I am not unmindful of the argument that consignment "to order" is common in these days. But a similar argument was used in The Springbok, supported by the testimony of some of the principal brokers in London, to the effect that a consignment "to order or assign" was the usual and regular form of consignment to an agent for sale at such a port as Nassau. . . . The argument still remains good, that if shippers, after the outbreak of war, consign goods of the nature of contraband to their own order without naming a consignee, it may be a circumstance of suspicion in considering the question whether the goods were really intended for the neutral destination, and to become part of the common stock of the neutral country, or whether they had another ultimate destination. Of course, it is not conclusive. The suspicion arising from this form of consignment during war might be dispelled by evidence produced by the shippers. . . .

Upon this branch of the case—for reasons which have been given when dealing with the consignments generally, and when stating the circumstances with respect to each claim—I have no hesitation in stating my conclusion that the cargoes (other than the small portions acquired by persons in Scandinavia whose claims are allowed) were not destined for consumption or use in Denmark or intended to be incorporated into the general stock of that country by sale or otherwise; that Copenhagen was not the real bona fide place of delivery; but that the cargoes were on their way at the time of capture to German territory as their actual and real destination. . . .

Having decided that the cargoes, though ostensibly destined for Copenhagen, were in reality destined for Germany, the question remains whether their real ultimate destination was for the use of the German Government or its naval or military forces.

If the goods were destined for Germany, what are the facts and the law bearing upon the question whether they had the further hostile destination for the German Government for military use?

In the first place, as has already been pointed out, they were goods adapted for such use; and further, in part, adapted for immediate warlike purposes in the sense that some of them could be employed for the production of explosives. They were destined, too, for some of the nearest German ports like Hamburg, Lübeck, and Stettin, where some of the forces were quartered, and whose connection with the operations of war has been stated. It is by no means necessary that the Court should be able to fix the exact port: see The Dolphin (1863), 7 Fed. Cases, 868; The Pearl (1866), 5 Wallace, 574; The Peterhoff (1866), 5 Wallace, 28, 59.

Regard must also be had to the state of things in Germany during this war in relation to the military forces, and to the civil population, and to the method described in evidence which was adopted by the Government in order to procure supplies for the forces.

The general situation was described by the British Foreign Secretary in his Note to the American Government on February 10, 1915, as follows:—

"The reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces or enemy Government disappears when the distinction between the civil population and the armed forces itself disappears. In any country in which there exists such a tremendous organization for war as now obtains in Germany, there is no clear division between those whom the Government is responsible for feeding and those whom it is not. Experience shows that the power to requisition will be used to the fullest extent in order to make sure that the wants of the military are supplied, and however much goods may be imported for civil use it is by the military that they will be consumed if military exigencies require it, especially now that the German Government have taken control of all the foodstuffs in the country."—I am not saying that the last sentence is applicable to the circumstances of this case.—

. . .

"In the peculiar circumstances of the present struggle where the forces of the enemy comprise so large a proportion of the population, and where there is so little evidence of shipments on private as distinguished from Government account, it is most

reasonable that the burden of proof should rest upon claimants."

It was given in evidence that about ten millions of men were either serving in the German army, or dependent upon or under the control of the military authorities of the German Government, out of a population of between 65 and 70 millions of men, women, and children. Of the food required for the population, it would not be extravagant to estimate that at least one-fourth would be consumed by these 10 million adults.

Apart altogether from the special adaptability of these cargoes for the armed forces, and the highly probably inference that they were destined for the forces, even assuming that they were indiscriminately distributed between the military and civilian population, a very large proportion would necessarily be used by the military forces. . . .

Now as to the question of the proof of intention on the part of the shippers of the cargoes.

It was argued that the Crown as captors ought to show that there was an original intention by the shippers to supply the goods to the enemy Government or the armed forces at the inception of the voyage as one complete commercial transaction, evidenced by a contract of sale or something equivalent to it.

It is obvious from a consideration of the whole scheme of conduct of the shippers that if they had expressly arranged to consign the cargoes to the German Government for the armed forces, this would have been done in such a way as to make it as difficult as possible for belligerents to detect it. If the captors had to prove such an arrangement affirmatively and absolutely, in order to justify capture and condemnation, the rights of belligerents to stop articles of conditional contraband from reaching the hostile destination would become nugatory. . . .

It is not necessary that an intention at the commencement of the voyage should be established by the captors either absolutely or by inference. . . . If at the time of the seizure the goods were in fact on their way to the enemy Government or its forces as their real ultimate destination, by the action of the shippers, whenever the project was conceived, or however it was to be carried out; if, in truth, it is reasonably certain that the shippers must have known that that was the real ultimate destination of the goods (apart of course from any genuine sale to be made at some intermediate place), the belligerent had a right to stop the goods on their way, and to seize them as confiscable goods. . . .

For the many reasons which I have given in the course of this judgment and which do not require recapitulation, or even summary, I have come to the clear conclusion from the facts proved, and the reasonable and, indeed, irresistible inferences from them, that the cargoes claimed by the shippers as belonging to them at the time of seizure were not on their way to Denmark to be incorporated into the common stock of that country by consumption, or bona fide sale, or otherwise; but, on the contrary, that they were on their way not only to German territory, but also to the German Government and their forces for naval and military use as their real ultimate destination.

To hold the contrary would be to allow one's eyes to be filled by the dust of theories and technicalities, and to be blinded to the realities of the case. . . .

NOTE.—The doctrine of continuous voyage, which might perhaps be more accurately described as the doctrine of enemy destination, originated in attempts to evade the famous Rule of 1756 by which neutrals are forbidden to participate in a trade from which they were excluded in time of peace. The doctrine has often been ascribed to Lord Stowell, but it was applied by English judges long before his time. See The Africa (1762), Burrell, 228, and The St. Croix (1763), Burrell, 228. For early discussions of the doctrine in reference to prohibited trade see The Welvaart (1799), 1 C. Robinson, 122; The Polly (1800), 2 Ib. 361; The Maria (1805), 5 Ib. 365; The Johanna Tholen (1805), 6 Ib. 72; The Ebenezer (1805), 6 Ib. 250; and The Thomyris (1808), 1 Edwards, 17. In the first cases the court was not exacting as to the evidence that the intermediate port was the bona fide terminus of the voyage. Landing of the cargo and payment of duty were especially regarded as conclusive. But the profits in such transactions were so great and the volume of business became so large that in The Essex, decided by the Lords of Appeal in 1805 (5 C. Robinson, 368), the court declined to accept such evidence as conclusive, and the better-known case of The William (5 C. Robinson, 395) established the rule which has ever since been followed. The doctrine of enemy destination was next extended to vessels trading with the enemy, The Jonge Pieter (1801), 4 C. Robinson, 79; The Matchless (1822), 1 Haggard, 97, 106; The Eliza Ann (1824), 1 Haggard, 257; Jecker v. Montgomery (1855), 18 Howard, 110, 114; The Mashona (1900), Cape of Good Hope, 17 S. C. R. 135.

The case of The Jesus, which arose in the Admiralty Court in 1756, and was appealed to the Lords of Appeal in 1759 and decided by them in 1761, shows that the principle of final destination as applied to contraband cargoes was known to the judges of that day. Burrell, 164. See also the decisions of Lord Stowell in The Twende Brodre (1801), 4 C. Robinson, 33, and The Eagle (1803), 5 C. Robinson, 401. A better known instance of its application to the transportation of contraband occurred in the case of The Frau Anna Howina (1855), decided by the French Prize Court in the Crimean War. See Calvo, V, sec. 2767. This decision seems to have attracted little attention and when the same question was raised in the American Prize Courts in the American Civil War, it was never cited. The doctrine of enemy

destination in connection with blockades was hinted at in several cases which arose in the Napoleonic wars, e. g., The Maria (1805), 6 C. Robinson, 201; The Lisette (1807), 6 Ib. 387; The Mercurius (1808), 1 Edwards, 53; but except possibly in the case of The Charlotte Sophia (1806), 6 C. Robinson, 204*n*, a case imperfectly reported, no vessel was condemned on that ground until the American Civil War. American cases besides The Peterhoff and The Springbok applying the doctrine either to the carriage of contraband or the breach of blockade (the two are not always distinguished) are The Dolphin (1863), 7 Fed. Cases, 862; The Pearl (1863), 19 Ib. 54; The Stephen Hart (1863), Blatchford, Prize Cases, 387 (the most elaborate discussion of the subject in the books); The Circassian (1864), 2 Wallace, 135; The Bermuda (1866), 3 Wallace, 514. The doctrine of continuous voyage or enemy destination was applied in the Chino-Japanese War of 1894-95, when the British mail steamer Gaelic, en route from San Francisco to the British port of Hong-Kong, made a regular stop at Yokohama and was searched by the Japanese authorities because suspected of carrying persons who were on their way to enter the Chinese service. See Takahashi, *Cases on International Law during the Chino-Japanese War*, xvii, 52; Westlake, *Collected Papers*, 461. In 1896, The Doelwijk, a Dutch ship with a cargo of arms, was captured on the high seas by an Italian cruiser and in the first prize case heard in the new kingdom of Italy was condemned by the Italian Prize Court at Rome on the ground that the cargo was to be landed at Djiboutil, a French port, for shipment overland to Abyssinia with which Italy was then at war. See articles by M. Prosper Fedozzi in *Revue de Droit International*, XXIX, 55, 75-80, and by M. Giulio Diena in *Journal du Droit International Privé*, XXIV, 268; Pillet, *Les Lois Actuelles de la Guerre*, sec. 216. The decision of the Italian Prize Court is printed in 2 *Commercial Cases*, 202. There was an important discussion of the doctrine of continuous voyage at the time of the South African War in connection with the seizure by British cruisers of the Bundesrath and other German vessels bound for the neutral Portuguese port of Lorenzo Marques on Delagoa Bay. It was through this port that the Boer republics, which had no seacoast, were obliged to carry on their commerce with the outside world. The British Government was unable to show that the cargoes of the German vessels were such as to justify their detention, but in the discussion of the legal questions involved, Lord Salisbury adopted the views set forth in the American decisions and quoted the German jurist Bluntschli to the effect that if the ships or cargoes are sent to a neutral port only to facilitate their reaching the enemy they are contraband and subject to confiscation. Moore, *Digest*, VII, 739. In the Turco-Italian War in 1912 an Italian cruiser seized the French steamer Carthage, bound from France to the French colony of Tunis, because it had on board an aeroplane alleged to be intended for the Turkish forces in Tripoli. The case was submitted to the Permanent Court of Arbitration at The Hague, which decided that there was insufficient evidence to establish the hostile destination of the aeroplane. See Wilson, *The Hague Arbitration Cases*, 352. The first application of the doctrine of enemy destination in the Great War seems to have been made by the British Prize Court in Malta in the case of The Venizelos, decided July 15, 1915. A cargo of food on a neutral vessel consigned by way of an Italian port to a commercial house in Switzerland was condemned as conditional contraband since the claimants were unable to prove that the

goods had an innocent destination. See *Journal of the Society of Comparative Legislation,* (N. S.) XVI, 70. On July 8, 1916, there was published in the London Gazette an Order in Council setting forth various principles of prize law to be observed. Among them was this:

> The principle of continuous voyage or ultimate destination shall be applicable both in cases of contraband and blockade.

In view of the decision of the French Prize Court in The Frou Howina, of the Italian Prize Court in The Doelwijk, and of the British Prize Courts in The Venizelos and The Kim, and in view of the position taken by Japan in the case of the Gaelic, by Great Britain in the case of the Bundesrath and in her Orders in Council of July 8, 1916, and by Italy in the case of The Carthage, the much reviled decision in the case of The Springbok may now be regarded as established law.

The doctrine of enemy destination is closely analogous to the rule followed by the American courts in determining whether a particular transaction is or is not interstate commerce. Just as the claimants in The William tried to divide one voyage into two by transshipment at an intermediate port, so shippers on American railways have tried to break up an interstate transaction into its component parts in order to make it appear to be an intrastate shipment. It is well settled, however, that whenever a commodity begins to move in interstate commerce it becomes a part of interstate commerce and falls under Federal jurisdiction even though it has not yet passed from the State of origin, The Daniel Ball (1871), 10 Wallace, 557, 565. A shipment which is really interstate will be treated as such, regardless of the agencies employed or the form of the bill of lading, Railroad Commission of Louisiana v. Texas & Pacific Ry. (1913), 229 U. S. 336; Baer Brothers Mercantile Co. v. Denver & Rio Grande Ry. (1914), 233 U. S. 479.

The literature of the doctrine of continuous voyage or enemy destination is extensive. In an unusually careful article "Early Cases on the Doctrine of Continuous Voyages" in *Am. Jour. Int. Law,* IV, 823, Mr. L. H. Woolsey showed that the doctrine did not originate with Lord Stowell but was applied by British Prize Courts in the Seven Years' War. See also C. B. Elliott, "The Doctrine of Continuous Voyages," *Ib.,* I, 61, C. N. Gregory, "The Doctrine of Continuous Voyage," *Report of 26th Conference, Int. Law Assoc.,* 120; *Int. Law Topics, 1905,* 77; *Int. Law Sit. 1910,* 90; Westlake, *Collected Papers,* 461; Baty, *Int. Law in South Africa,* 1-44; Pyke, *The Law of Contraband of War,* ch. xii; Moore, *Digest,* VII, 697.

CHAPTER XIII.

THE RIGHTS AND DUTIES OF NEUTRALS.

SECTION 1. THE INVIOLABILITY OF NEUTRAL TERRITORY.

THE TWEE GEBROEDERS.

HIGH COURT OF ADMIRALTY OF GREAT BRITAIN. 1800.
3 C. Robinson, 162.

Sir W. SCOTT [LORD STOWELL]—This ship was taken on the 14th July 1799, on a voyage from Embden to Amsterdam, which was then under blockade; a claim has been given by the Prussian government, asserting the capture to have been made within the Prussian territory. In the course of the discussion, which this suit has produced, it has been contended that although the act of capture itself might not take place within the neutral territory, yet, that the ship to which the capturing boats belonged was actually lying within the neutral limits; and therefore, that wherever the place of capture might be, the station of the ship was in itself sufficient to affect the legality of the capture.

Upon the question so proposed, the first fact to be determined is, the character of the place where the capturing ship lay; whether she was actually stationed within those portions of land and water, or of something between water and land, which are considered to be within the limits of the Prussian territory? . . . I am of opinion, that the ship was lying within those limits, in which all direct hostile operations are by the law of nations forbidden to be exercised. That fact being assumed I have only to inquire, whether the ship being so stationed, the capture which took place, was made under such circumstances, as oblige us to consider it as an act of violence, committed within the protection of a neutral territory.

It is said that the ship was, in all respects, observant of the peace of the neutral territory; that nothing was done by her, which could affect the right of territory, or from which any

inconvenience could arise to the country, within whose limits she was lying; inasmuch as the hostile force which she employed, was applied to the captured vessel lying out of the territory. But that is a doctrine that goes a great deal too far; I am of opinion, that no use, of a neutral territory, for the purposes of war, is to be permitted; I do not say remote uses, such as procuring provisions and refreshments, and acts of that nature, which the law of nations universally tolerates; but that, no proximate acts of war are in any manner to be allowed to originate on neutral grounds; and I cannot but think, that such an act as this, that a ship should station herself on neutral territory, and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted: for, suppose that even a direct hostile use should be required, to bring it within the prohibition of the law of nations; nobody will say, that the very act of sending out boats to effect a capture, is not itself an act directly hostile—not complete indeed, but inchoate, and clothed with all the characters of hostility. If this could be defended, it might as well be said, that a ship lying in a neutral station might fire shot on a vessel lying out of the neutral territory; the injury in that case would not be consummated, nor received on neutral ground; but no one would say, that such an act would not be an hostile act, immediately commenced within the neutral territory: And what does it signify to the nature of the act, considered for the present purpose, whether I send out a cannon-shot which shall compel the submission of a vessel lying at two miles distance, or whether I send out a boat armed and manned to effect the very same thing at the same distance? It is in both cases the direct act of the vessel lying in neutral ground; the act of hostility actually begins, in the latter case, with the launching and manning and arming the boat, that is sent out on such an errand of force.

If it were necessary therefore to prove, that a direct and immediate act, of hostility had been committed; I should be disposed to hold that it was sufficiently made out by the facts of this case.—But direct hostility appears not to be necessary; for whatever has an immediate connection with it is forbidden: you cannot, without leave, carry prisoners or booty into a neutral territory, there to be detained, because such an act is an immediate continuation of hostility. In the same manner, an act of hostility is not to take its commencement on neutral ground: It is not sufficient to say it is not completed there—you are not to take any measure there, that shall lead to immediate violence;

you are not to avail yourself of a station, on neutral territory, making as it were a vantage ground of the neutral Country, a Country which is to carry itself with perfect equality between both belligerents, giving neither the one or the other any advantage. Many instances have occurred in which such an irregular use of a neutral Country has been warmly resented, and Some during the present war; the practice which has been tolerated in the northern states of Europe, of permitting French privateers to make stations of their ports and to sally out to capture British vessels in that neighborhood, is of that number; and yet even that practice, unfriendly and noxious as it is, is less than that complained of in the present instance; for here the ship, without sallying out at all, is to commit the hostile act. Every government is perfectly justified in interposing to discourage the commencement of such a practice; for the inconvenience to which the neutral territory will be exposed is obvious; if the respect due to it is violated by one party, it will soon provoke a similar treatment from the other also; till, instead of neutral ground, it will soon become the theatre of war. On these grounds, I am of opinion, that their capture cannot be maintained, and I direct these vessels to be restored.

NOTE.—The law of neutrality is the most recently developed of the great divisions of international law. It was a concept unknown to antiquity and the middle ages. In every war it was assumed that every nation would be a friend or partisan of one or the other of the belligerents. The publicists of the eighteenth century, particularly Vattel, advocated as a matter of theory something like the modern law of neutrality. But it remained for Washington, actuated chiefly by the necessities of the young American republic, to give these theories practical effect by adopting them as the policy of the government. His steadfast devotion to the principle which he had espoused and his refusal to be diverted by the clamor of Jefferson and his followers in favor of France entitle Washington to recognition as the father of the modern law of neutrality. See Foster, *A Century of American Diplomacy*, 151; Lodge, *George Washington*, II, ch. iv; Evans, *Writings of Washington*, 404. On the law of neutrality in general see Bonfils (Fauchille), 942; Kleen, *Lois et Usages de la Neutralité;* Pillet, *Les Lois Actuelles de la Guerre*, chs. xi, xii; Fenwick, *The Neutrality Laws of the United States;* Moore, *Digest*, VII, ch. xxviii; Cobbett, *Cases and Opinions*, II, Part III. For the application of the principles of neutrality in the wars of the last half-century, see Bernard, *The Neutrality of Great Britian during the American Civil War;* Benton, *International Law and Diplomacy of the Spanish-American War;* Campbell, *Neutral Rights and Obligations in the Anglo-Boer War;* Ariga, *La Guerre Russo-Japonaise;* Hershey, *International Law and Diplomacy of the Russo-Japanese War;* Takahashi, *International Law as Applied to the Russo-Japanese War;* Lawrence, *War and Neutrality in the Far East;* Phillipson, *International Law and the Great War.*

The development of the law of neutrality, particularly as respects the rights of neutrals, has been much hampered by the fact that the judicial determination of questions involving such rights has been largely in the hands of prize courts, which, not unnaturally, have been strongly impressed by the necessities of the belligerents which established them. Furthermore no neutral government can overlook the fact that it may sometime cease to be a neutral, and that the protests which it makes as a neutral against the claims of belligerents may be cited against it when it in turn becomes a belligerent. And in every country the powerful influence of the army and navy is unavoidably directed to the preservation of the rights of the government as a belligerent rather than as a neutral. As a result of all these forces, the rules governing the rights of neutrals have been formulated either by the prize courts of belligerents or by neutral governments which sought to compromise between their actual status as neutrals and their potential status as belligerents. In consequence the law governing neutral rights is crude and indefinite, and it would seem possible for it to attain a satisfactory condition only by development with reference to some consistent principle.

The law as to neutral duties has been largely codified by Convention V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, and Convention XIII concerning the Rights and Duties of Neutral Powers in Naval War, both adopted at The Hague Conference of 1907. See Scott, *The Hague Conventions and Declarations of 1899 and 1907*, 133, 209. How far these conventions are binding is in dispute.

THE ELIZA ANN.

HIGH COURT OF ADMIRALTY OF GREAT BRITAIN. 1813.
1 Dodson, 244.

There were three cases of American ships, laden with hemp, iron and other articles, and seized in Hanoe Bay, on the 11th of August, 1812, by His Majesty's ship Vigo, which was then lying there with other British ships of war. A claim was given, under the direction of the Swedish minister, for the ships and cargoes, "as taken within one mile of the mainland of Sweden, and within the territory of His Majesty the King of Sweden, contrary to and in violation of the law of nations, and the territory and jurisdiction of His said Majesty."

SIR W. SCOTT [LORD STOWELL].—These vessels came into Hanoe Bay for the purpose of taking the benefit of British convoy, and were seized in consequence of the order for the detention of American property. This order has been since followed up by a declaration of war; the ships, therefore, would be liable to condemnation, unless it can be shown that they are entitled to some special protection.

A claim has been given by the Swedish consul, for these ships and cargoes, as having been taken within the territories of the King of Sweden, and in violation of his territorial rights. This claim could not have been given by the Americans themselves; for it is the privilege, not of the enemy, but of the neutral country, which has a right to see that no act of violence is committed within its jurisdiction. When a violation of neutral territory takes place, that country alone, whose tranquillity has been disturbed, possesses the right of demanding reparation for the injury which she has sustained. It is a principle that has been established by a variety of decisions, both in this and in the superior Court, that the enemy, whose property has been captured, cannot himself give the claim, but must resort to the neutral for his remedy. Acts of violence by one enemy against another are forbidden within the limits of a neutral territory, unless they are sanctioned by the authority of the neutral state, which it has the power of granting to either of the belligerents, subject, of course, to a responsibility to the other. A neutral state may grant permission for such acts beforehand, or acquiesce in them after they shall have taken place, or it may, as has been done in the present instance, step forward and claim the property.

I do not observe it to be stated in the claim, that the sovereign on whose behalf it was given was a neutral at the time when the transaction took place. But, in order to give effect to a claim of this kind, it must be shewn that the party making it was then in a state of clear and indisputable neutrality. If he has shewn more favour to one side than to the other, if he has excluded the ships of one of the belligerents from his ports, and hospitably received those of the other, he cannot be considered as acting with the necessary impartiality. I do not think a country, shewing such an invidious distinction, entitled to claim in the character of a neutral state. The high privileges of a neutral are forfeited by the abandonment of that perfect indifference between the contending powers in which the essence of neutrality consists.

A claim, however, has been given by the Swedish minister. Now, in order to support and give effect to this claim, two things are necessary to be established.—First, it is requisite that Sweden should appear to have been in a state of perfect neutrality at the time when the seizure was made.—Secondly, it must be shewn that the act of violence was committed within the limits of Swedish territory. For, if the scene of hostility did not lie

within the territories of the neutral state, then has there been no violation of its neutral rights. . . .

The first question then is, how far, in August, 1812, Sweden was to be considered as a neutral country. . . . [The learned judge finds that Great Britain and Sweden had been at war, and although a treaty of peace had been signed at the time of the seizure, it had not yet been ratified. Hence the court holds that the two countries were still at war.] But, in order to give validity to the present claim . . . it must be shewn that the place of capture was within the Swedish territories; and I am of opinion that it was not. Hanoe had been taken possession of by a British force, and that possession had not been disturbed. . . . There was no semblance of Swedish authority. . . . I am of opinion that the claim which has been given fails upon the two essential points . . . and consequently that these ships and cargoes are liable to condemnation.

THE ANNE.

SUPREME COURT OF THE UNITED STATES. 1818.
3 Wheaton, 435.

Appeal to the circuit court for the district of Maryland.

The British ship Anne, with a cargo belonging to a British subject, was captured by the [American] privateer Ultor while lying at anchor near the Spanish part of the island of St. Domingo, on the 13th of March, 1815, and carried into New York for adjudication. . . . Prize proceedings were duly instituted against the ship and cargo, and a claim was afterwards interposed in behalf of the Spanish consul, . . . on account of an asserted violation of the neutral territory of Spain. . . . The district court rejected the claim, and pronounced a sentence of condemnation to the captors. Upon appeal to the circuit court, peace having taken place, the British owner . . . interposed a claim for the property, and the decree of the district court was affirmed. . . .

Mr. JUSTICE STORY delivered the opinion of the court. . . . [The learned judge finds that the capture was made in Spanish waters, but that the Spanish consul had not been authorized by his government to interpose a claim for the restitution of the vessel.]

The claim of the Spanish government for the violation of its neutral territory being thus disposed of, it is next to be considered whether the British claimant can assert any title founded upon that circumstance. By the return of peace, the claimant became rehabilitated with the capacity to sustain a suit in the courts of this country; and the argument is, that a capture made in a neutral territory is void; and, therefore, the title by capture being invalid, the British owner has a right to restitution. The difficulty of this argument rests in the incorrectness of the premises. A capture made within neutral waters is, as between enemies, deemed, to all intents and purposes, rightful; it is only by the neutral sovereign that its legal validity can be called in question; and as to him and him only, is it to be considered void. The enemy has no rights whatsoever; and if the neutral sovereign omits or declines to interpose a claim, the property is condemnable, *jure belli,* to the captors. This is the clear result of the authorities; and the doctrine rests on well established principles of public law.

There is one other point in the case which, if all other difficulties were removed, would be decisive against the claimant. It is a fact, that the captured ship first commenced hostilities against the privateer. This is admitted on all sides; and it is no excuse to assert that it was done under a mistake of the national character of the privateer, even if this were entirely made out in the evidence. While the ship was lying in neutral waters, she was bound to abstain from all hostilities, except in self-defence. The privateer had an equal title with herself to the neutral protection, and was in no default in approaching the coast without showing her national character. It was a violation of that neutrality which the captured ship was bound to observe, to commence hostilities for any purpose in these waters; for no vessel coming thither was bound to submit to search, or to account to her for her conduct or character. When, therefore, she commenced hostilities, she forfeited the neutral protection, and the capture was no injury for which any redress could be rightfully sought from the neutral sovereign.

The conclusion from all these views of the case is, that the ship and cargo ought to be condemned as good prize of war. *Decree affirmed.*

THE FLORIDA.

SUPREME COURT OF THE UNITED STATES. 1879.
101 U. S. 37.

Appeal from the Supreme Court of the District of Columbia.

[On Oct. 7, 1864, the Confederate steamer Florida was captured by the American steamer Wachusett in the port of Bahia, Brazil, and brought to Hampton Roads, where in a collision she was sunk. The act of the captain of the Wachusett was disavowed by the United States. The captain having libelled the Florida as a prize of war, his libel was dismissed by the lower court, and he appealed.]

Mr. Justice SWAYNE, . . . delivered the opinion of the court.

The legal principles applicable to the facts disclosed in the record are well settled in the law of nations, and in English and American jurisprudence. Extended remarks upon the subject are, therefore, unnecessary. See Grotius, De Jure Belli, b. 3, c. 4, sect. 8; Bynkershoek, 61, c. 8; Burlamaqui, vol. ii. pt. 4, c. 5, sect. 19; Vattel, b. 3, c. 7, sect. 132; Dana's Wheaton, sect. 429 and note 208; 3 Rob. Ad. Rep. 373; 5 id. 21; The Anne, 3 Wheat. 435; La Amistad de Rues, 5 id. 385; The Santissima Trinidad, 7 id. 283, 496; The Sir William Peel, 5 Wall. 517; The Adela, 6 id. 266; 1 Kent, Com. (last ed.), pp. 112, 117, 121.

Grotius, speaking of enemies in war, says: "But that we may not kill or hurt them in a neutral country, proceeds not from any privileges attached to their persons, but from the right of the prince in whose dominions they are."

A capture in neutral waters is valid as between belligerents. Neither a belligerent owner nor an individual enemy owner can be heard to complain. But the neutral sovereign whose territory has been violated may interpose and demand reparation, and is entitled to have the captured property restored.

The latter was not done in this case because the captured vessel had been sunk and lost. It was, therefore, impossible.

The libellant was not entitled to a decree in his favor, for several reasons.

The title to captured property always vests primarily in the government of the captors. The rights of individuals, where such rights exist, are the results of local law or regulations. Here, the capture was promptly disavowed by the United States. They, therefore, never had any title.

The case is one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it. Phillips v. Payne, 92 U. S. 130.

These things must necessarily be so, otherwise the anomaly would be possible, that, while the government was apologizing and making reparation to avoid a foreign war, the offending officer might, through the action of its courts, fill his pockets with the fruits of the offence out of which the controversy arose. When the capture was disavowed by our government, it became for all the purposes of this case as if it had not occurred.

Lastly, the maxim, "*ex turpi causa non oritur actio,*" applies with full force. No court will lend its aid to a party who founds his claim for redress upon an illegal act.

The Brazilian Government was justified by the law of nations in demanding the return of the captured vessel and proper redress otherwise. It was due to its own character, and to the neutral position it had assumed between the belligerents in the war then in progress, to take prompt and vigorous measures in the case, as was done. The commander was condemned by the law of nations, public policy, and the ethics involved in his conduct. *Decree affirmed.*

NOTE.—The general rule governing the restitution of vessels captured in neutral waters was well stated in The Sir William Peel (1867), 5 Wallace, 517, 536:

> Neither an enemy nor a neutral acting the part of an enemy can demand restitution of captured property on the sole ground of capture in neutral waters.

See also The De Fortuyn (1760), Burrell, 175; The Purissima Conception (1805), 6 C. Robinson, 45; The Diligentia (1814), 1 Dodson, 404, 412; The Lilla (1862), 2 Sprague, 177; The Adela (1867), 6 Wallace, 266; The Bangor (1916), L. R. [1916] P. 181. This rule is based partly on the fact that an enemy could not appear as a claimant and partly on the fact that the violation of a country's neutrality was regarded as an offense against the country where the capture was made rather than against the owner whose property was taken. If, however, the owner is a neutral or a citizen of the state of the captor, the first of these reasons disappears. Hence in The Sir William Peel, *ante,* the court allowed a neutral claimant to set up the invalidity of a capture made in neutral waters, and decreed the restitution of the vessel, but refused to allow damages for its detention because of suspicious circumstances affecting the question of its neutral character. This was one of the cases submitted to the British-American Claim Commission established by the Treaty of Washington, and that Commission, not being bound by the rules of the prize courts, allowed damages on the ground that the whole transaction was invalid because the

capture was made in neutral waters. See Moore, *Int. Arb.* IV, 3935. For an instance of seizure in a foreign jurisdiction because of violation of municipal neutrality laws, see The Itata (1892), Moore, *Int. Arb.* III, 3067.

THE APPAM.

DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA. 1916.
234 Fed. 389.

[On January 15, 1916, the British passenger steamer Appam, en route from West Africa to Liverpool, was captured on the high seas by the German cruiser Moewe in latitude 33.19 N., longitude 14.24 W. The point of capture was about 1,590 miles from Emden, the nearest German port; 130 miles from Punchello in the Madeiras, the nearest available port; 1,450 miles from Liverpool, and 3,051 miles from Hampton Roads, Virginia. After remaining in the vicinity of the Moewe for two days, a German prize crew was placed on board, dynamite bombs were distributed about the ship which the German commander was instructed to explode in case of "any trouble, mutiny, or attempt to take the ship," and the crew of the Appam were compelled to navigate the vessel to Hampton Roads, where it arrived January 31, 1916. Application was at once made to the Secretary of State for the internment of both vessel and crew. This was denied, and the crew were released with their personal effects. The owner and master of the Appam then filed their libels in admiralty for the purpose of obtaining possession of the vessel and cargo.]

WADDILL, District Judge. . . .

The question for consideration is whether the vessel and her cargo, belonging to a subject of Great Britain, captured by a cruiser of the German Empire, upon the high seas, during the existence of war between the two countries, can be brought by a prize master and crew into the waters of the United States, for the purpose of being there laid up.

The libelants earnestly urge that this cannot be done, and that the coming in, as well as the insistence upon the right of asylum under the circumstances of this case, constitutes a violation of the neutrality of the United States, entitling the owners to restitution of their property; whereas, the respondents maintain the

right to bring in their prize, as well as the right of asylum for the same, during pleasure, pending the continuance of the war, and insist that such right exists as well under general international law as under treaty existing between this country and Prussia, now a part of the German Empire; that the prize is the property of the German government by reason of its capture from a citizen of a belligerent country on the high seas, by one of its duly commissioned war vessels; that the title or right of possession thereto cannot be inquired into by this government, or the respondents impleaded in the courts of the United States; that the court of the captor country alone can determine the validity of the seizure and title to said prize; and that this government, under the existing treaty cannot deny to the capturing country the right of asylum for said prize. . . .

This, it will be borne in mind, is not a case of a war, public, or merchant vessel seeking internment in the waters of the United States, nor of any such vessel coming in for temporary sojourn; nor a war vessel bringing in its prize captured at sea; nor of such war vessel sending its prize under the convoy of a war vessel; nor of a captor with its prize, forced in by reason of stress of weather, want of fuel or provisions, or for necessary repairs: but that of a vessel captured at sea, placed in charge of a prize master and 22 German sailors, who had been British prisoners on the Appam, and who, together with the Appam's crew, working under duress and threat of the loss of their lives, navigated the ship across the ocean, some 1,500 miles further from the scene of the capture than to the nearest German port, into Hampton Roads, an inland water of the United States, within the jurisdiction of this court, for the purpose of indefinite asylum; the wording of the commission of the prize master being to "take her to the nearest American port and there to lay her up."

Treating this case in its true light, these considerations arise, and become material, namely: (1) What are the rights existing between this country and Germany, respecting the right of entry of prizes of war captured at sea, and of asylum, in the waters of the United States, whether arising under treaty or international law; (2) has this court jurisdiction to entertain these suits for restitution of the property in question to its owners; and (3) what is the character of the property seized, whether public or private, and can the court, as against the German government, who claims the right to adjudicate its title

by its own prize court, determine the rights thereof, and afford relief as between the litigants.

[1] *First.* The respondents vigorously maintained from the coming in of the prize, and the inception of this litigation, the right to bring the Appam and her cargo in for the purpose of asylum, as well under treaty with this country, as under international law, and rely especially on the treaty between the United States and Prussia of 1799, as renewed and continued in 1828, in support thereof. . . .

A careful review of the provisions of the Prussian treaty, when read in the light of the rulings and interpretation placed upon other contemporaneous treaties, especially article 17 of the Treaty of Amity and Commerce with France in 1778, convinces the court that . . . under the same, prizes cannot be brought into the waters of the United States for the purpose of laying up by a prize master, but can only be brought in by the capturing vessel herself, or a war vessel acting as convoy to such prize, and then, not for an indefinite period, but for the temporary causes recognized by international law.

What are the rights of the Appam under general international law? Was she entitled to come into the waters of the United States, and, if so, has she the right of asylum therein? These questions must be answered in the light of that law. The generally accepted doctrine, now, is that enlightened nations do not allow the use of their ports as asylum or permanent rendezvous of prizes of other nations captured during war. To do so would tend to involve the neutral powers in conflict with nations with whom they are at peace; and to extend the use of their ports to all belligerents alike, would not relieve the objection, as the opposing vessels so using them might quickly cause conflict in neutral territory. The policy of the United States has been, and is, consistently opposed to such use of their waters and harbors; and the history and origin of their neutrality laws, and the circumstances of their passage, clearly indicate a purpose to prohibit the use of their ports for the laying up of belligerent prizes.

The provisions of articles 21 and 22 of the Hague Convention (13) of 1907 are declaratory of the existing law of nations, and the fact that article 23, which provided for the use of neutral ports by belligerent prizes, was expressly rejected, and 21 and 22 adopted by the United States, but emphasizes its policy respecting the subject. It is true Great Britain did not ratify the action of its commissioners, assenting to the provisions of

articles 21 and 22 of the Hague Convention, though most of the other powers, some 43 in number, including Germany and the United States, did. Still, it nevertheless shows what the policy of the United States and Germany alike was, in regard to the use of their waters and harbors for belligerent prizes. Articles 21 and 22 are as follows:

"Article 21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

"It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

"Article 22. A neutral power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in article 21."

The American delegates reported regarding these articles:

"Articles 21 and 25 relate to the admission of prizes to neutral ports. Articles 21 and 22 seem to be unobjectionable. Article 23 authorizes the neutral to permit prizes to enter its ports and to remain there pending action on their cases by the proper prize courts. This is objectionable for the reason that it involves a neutral in participation in the war to the extent of giving asylum to a prize which the belligerent may not be able to conduct to a home port. This article represents the revival of an ancient abuse, and should not be approved."

The Hague Convention (13) was signed at The Hague on the 13th of October, 1907, and was ratified by the Senate of the United States in executive session on the 17th of April, 1908. That body, however, excepted and excluded article 23 (36 Stat. L. pt. 2, p. 2438). The law, as shown in Dana's note (1866) to Wheaton's International Law (8th American Ed.) § 391, is as follows:

"The modern practice of neutrals prohibits the use of their ports by the prize of a belligerent, except in cases of necessity; and they may remain in the ports only for a meeting of the exigency. The necessity must be one arising from perils of the seas, or need of repairs for seaworthiness, or provisions and supplies."

The British government, at the beginning of the Civil War in the United States, took this position, and so instructed the British admiralty. Subsequently, like position was taken by

other prominent powers, and the same view has been taken generally from time to time by different nations down to our war with Spain in 1898, and to the present time. It was said by Attorney General Wirt:

"It would be a breach of neutrality to permit a port to be made a cruising station for a belligerent, or a depot for his spoils and prisoners. It is not a breach of neutrality to permit a vessel captured as prize to be repaired in our ports, and put in a condition to be taken to the port of the captor for adjudication." 2 Op. Atty. Gen., 86.

Mr. Seward, Secretary of State, replying to the Peruvian Legation as to the position of the United States respecting the war between Spain and Peru, said:

"This government will observe the neutrality which is enjoined by its own municipal law and by the law of nations. No armed vessel of either party will be allowed to bring their prizes into the ports of the United States." Moore's Digest, § 1302, p. 738.

In the Flad Oyen Case (1 C. Rob. 135) Lord Stowell, considering the subject, said:

"It gives one belligerent the unfair advantage of a new station of war which does not properly belong to him, and it gives to the other the unfair advantage of an active enemy in a quarter where no enemy would naturally be found. The coasts of Norway could no longer be approached by the British merchant with safety, and a suspension of commerce would soon be followed by a suspension of amity.

"Wisely, therefore, did the American government defeat a similar attempt made on them, at an earlier period of the war; they knew that to permit such an exercise of the rights of war within their cities would be to make their coasts a station of hostility."

Reference may also be had to Hall's International Law (5th Ed.) p. 618, and Laws of War, Risley, p. 176; Bluntschli on International Law, § 778, Int. Law, Note.

The right of belligerents to use neutral waters, as an asylum for prizes, can no longer be successfully contended for. . . .

[3] *Third.* Respondents further maintain that the Appam and her cargo cannot be proceeded against in these causes, because title to the same vested in the German government by reason of capture at sea by a German war vessel from an enemy country; that the Appam is a lawful prize of war, entitled to remain in the waters of the United States, a neutral power,

without interference on the part of that government; and that its title can only be inquired into and divested by the action of the prize court of their own country.

No claim that the Appam is a public war vessel of the German Empire can be maintained under the facts of this case. Indeed, in the pleadings, the contention is not made, and on the contrary she is claimed to be a prize of war, which places her in an entirely different category as respects title and ownership. Under modern authority, title does not become vested in the captor of the prize by mere capture, and not until lawful condemnation is had by the proper court of the captor country. This is particularly true where the prize is not taken into the captor's country. . . .

The reason of this rule is manifest, and arises from the fact that until lawful condemnation by a court of competent jurisdiction is had of the prize property, the title of the captor, as between himself and the owner, is incomplete and inchoate, and circumstances may readily arise, of which this case affords an example, in which the title of the captor might never become vested, by reason of his own act. . . .

The further contention is made by the respondent that the violation of neutrality, to be cognizable, must be proved to have contributed to the capture, and that subsequent or otherwise unrelated violations are immaterial. This proposition the court cannot assent to; that is, that there may be no violations of neutrality after the prize is captured, entitling the belligerent owner to restitution at the hands of a neutral government, in whose country the property may be found. In this case, the fact should not be lost sight of that the violation of the neutrality of the United States is exceedingly closely related to the capture itself. This capture, it is true, was well away on the high seas, but the captors of their own volition, and for their own purposes, determined not to take, or attempt to take, the prize to one of their own ports, or that of their allies, where alone the validity of the capture could be determined, though in distance not more than half so far away as the United States, nor to hazard longer the chances of her recapture at sea, but required the ship's officers and crew, under duress, to bring the ship into the nearest port of the United States, there to be laid up, and she was so brought, and the effort to secure permission to lay up was unsuccessfully made. From the moment of the capture, to that of entering the Virginia Capes, the Appam and her cargo were subject to recapture by the ships of the

owner's country or that of their allies, or to be retaken by the owner. Should other or greater rights be secured by taking refuge in the harbor of a neutral, which the Appam had no right to enter without flagrantly violating the laws of neutrality? Does not such violation, having for its object the getting away with the prize and the safe-keeping of the same, so relate back to the original seizure as to become a part thereof? Is not the capture, the flight to a supposed place of safety, and the successful entry therein, but one continuous occurrence, and should she, thus attempting to avail herself of the use of neutral waters for the purpose of escape with her prize, in contravention of the laws of neutrality, do so without at the same time incurring the consequences of the violation? The failure to take, or even attempt to take, the prize to a port of the captor's country, or that of an ally, where prize proceedings could regularly and lawfully have been inaugurated, should prevent the captor from denying to the owner a day to be heard in the courts of the neutral country, where, of choice, the prize had been brought and deposited, respecting his right to restitution of his property by reason of the violation of the neutrality of such neutral country. The validity of the capture, as well as all questions of prize law, are to be determined by the German prize court, and are not matters for the consideration of this court; but this court has the right to determine whether the neutrality laws of the United States have been violated, and the consequences thereof, as bearing upon the restitution of the prize property to its owners (The Estrella, 4 Wheat. 308, 4 L. Ed. 574), and in a proper case to restore the same to them.

The court's conclusion is that the manner of bringing the Appam into the waters of the United States, as well as her presence in those waters, constitutes a violation of the neutrality of the United States; that she came in without bidding or permission; that she is here in violation of law; that she is unable to leave for lack of a crew, which she cannot provide or augment without further violation of neutrality; that in her present condition, she is without lawful right to be and remain in these waters; that she, as between her captors and owners, to all practical intents and purposes, must be treated as abandoned, and stranded upon our shores; and that her owners are entitled to restitution of their property, which this court should award, irrespective of the prize court proceedings of the court of the imperial government of the German Empire; and it will be so ordered.

NOTE.—It is well settled that a captor who takes his prize into a neutral port subjects it to the neutral jurisdiction, which may restore it to the original owner if there has been any infraction of neutrality on the part of the captor. See L'Invincible (1816), 1 Wheaton, 238; The Estrella (1819), 4 Wheat, 298; The Gran Para (1822), 7 Ib. 471; The Queen v. The Chesapeake and Cargo (Nova Scotia, 1864), 1 Oldright, 797. For other examples of the use of neutral territory by belligerents see, "Neutral Port as Refuge to Escape Capture," *Int. Law Sit. 1904*, 79; "The Twenty-four Hour Rule," Ib. *1908*, 37; "Sequestration of Prize," Ib. 53; "Asylum in Neutral Port," Ib. *1911*, 9. On the use of neutral territory as an asylum see Oppenheim, II, 409-425; Moore, *Digest*, VII, 982. On the attempt of the French minister, Genet, to set up prize courts in the United States see Glass v. The Sloop Betsey (1794), 3 Dallas, 6.

SECTION 2. THE PREVENTION OF UNNEUTRAL ACTS IN NEUTRAL TERRITORY.

THE SANTISSIMA TRINIDAD AND THE ST. ANDER.

SUPREME COURT OF THE UNITED STATES. 1822.
7 Wheaton, 283.

This was a libel filed by the consul of Spain, in the District Court of Virginia, in April, 1817, against eighty-nine bales of cochineal, two bales of jalap, and one box of vanilla, originally constituting part of the cargoes of the Spanish ships Santissima Trinidad and St. Ander, and alleged, to be unlawfully and piratically taken out of those vessels on the high seas by a squadron consisting of two armed vessels called the Independencia del Sud and the Altravida, and manned and commanded by persons assuming themselves to be citizens of the United Provinces of the Rio de la Plata. The libel was filed, in behalf of the original Spanish owners, by Don Pablo Chacon, consul of his Catholic Majesty for the port of Norfolk, and as amended, it insisted upon restitution, principally for three reasons: (1) That the commanders of the capturing vessels, the Independencia and the Altravida, were native citizens of the United States, and were prohibited by our treaty with Spain of 1795, from taking commissions to cruise against that power. (2) That the said capturing vessels were owned in the United States, and were originally equipped, fitted out, armed and manned in the United States, contrary to law. (3) That their force and armament had been illegally augmented within the United States. . . . [Further facts appear in the opinion.]

The District Court, upon the hearing of the cause, decreed restitution to the original Spanish owners. That sentence was affirmed in the Circuit Court, and from the decree of the latter the cause was brought by appeal to this Court.

Mr. Justice Story delivered the opinion of the Court.

Upon the argument at the bar several questions have arisen, which have been deliberately considered by the Court; and its judgment will now be pronounced. The first in the order, in which we think it most convenient to consider the cause, is, whether the Independencia is in point of fact a public ship, belonging to the government of Buenos Ayres. The history of this vessel, so far as is necessary for the disposal of this point, is briefly this: She was originally built and equipped at Baltimore as a privateer during the late war with Great Britain, and was then rigged as a schooner, and called the Mammoth, and cruised against the enemy. After the peace she was rigged as a brig, and sold by her original owners. In January, 1816, she was loaded with a cargo of munitions of war, by her new owners, who are inhabitants of Baltimore, and being armed with twelve guns, constituting a part of her original armament, she was despatched from that port, under the command of the claimant, on a voyage, ostensibly to the Northwest Coast, but in reality to Buenos Ayres. By the written instructions given to the supercargo on this voyage, he was authorized to sell the vessel to the government of Buenos Ayres, if he could obtain a suitable price. She duly arrived at Buenos Ayres, having exercised no act of hostility, but sailed under the protection of the American flag, during the voyage. At Buenos Ayres the vessel was sold to Captain Chaytor and two other persons; and soon afterwards she assumed the flag and character of a public ship, and was understood by the crew to have been sold to the government of Buenos Ayres; and Captain Chaytor made known these facts to the crew, and asserted that he had become a citizen of Buenos Ayres; and had received a commission to command the vessel as a national ship; and invited the crew to enlist in the service; and the greater part of them accordingly enlisted. From this period, which was in May, 1816, the public functionaries of our own and other foreign governments at that port, considered the vessel as a public ship of war, and such was her avowed character and reputation. . . .

The next question growing out of this record, is whether the property in controversy was captured in violation of our neu-

trality, so that restitution ought, by the law of nations, to be decreed to the libellants. Two grounds are relied upon to justify restitution: First, that the Independencia and Altravida were originally equipped, armed, and manned as vessels of war in our ports; Secondly, that there was an illegal augmentation of the force of the Independencia within our ports. Are these grounds, or either of them, sustained by the evidence? . . .

The question as to the original illegal armament and outfit of the Independencia may be dismissed in a few words. It is apparent, that though equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws on our national neutrality. If captured by a Spanish ship of war during the voyage she would have been justly condemned as good prize, and for being engaged in a traffic prohibited by the law of nations. But there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit; and which only exposes the persons engaged in it to the penalty of confiscation. Supposing, therefore, the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a *bona fide* sale, (and there is nothing in the evidence before us to contradict it,) there is no pretence to say, that the original outfit on the voyage was illegal, or that a capture made after the sale was, for that cause alone, invalid.

The more material consideration is as to the augmentation of her force in the United States, at a subsequent period. . . . [It appeared in evidence that after cruising against Spain, the Independencia put into Baltimore for repairs. Whether she increased her armament in the course of the repairs seemed doubtful, but it was admitted that while at Baltimore she enlisted about thirty persons in her crew.] The Court is, therefore, driven to the conclusion, that there was an illegal augmentation of the force of the Independencia in our ports by a substantial increase of her crew; and this renders it wholly unnecessary to enter into an investigation of the question, whether there was not also an illegal increase of her armament. . . .

And here we are met by an argument on behalf of the claimant, that the augmentation of the force of the Independencia within our ports, is not an infraction of the law of nations, or a violation of our neutrality; and that so far as it stands prohibited by our municipal laws the penalties are personal, and

do not reach the case of restitution of captures made in the cruise, during which such augmentation has taken place. It has never been held by this Court, that an augmentation of force or illegal outfit affected any captures made after the original cruise was terminated. By analogy to other cases of violations of public law the offence may well be deemed to be deposited at the termination of the voyage, and not to affect future transactions. But as to captures made during the same cruise, the doctrine of this Court has long established that such illegal augmentation is a violation of the law of nations, as well as of our own municipal laws, and as a violation of our neutrality, by analogy to other cases, it infects the captures subsequently made with the character of torts, and justifies and requires a restitution to the parties who have been injured by such misconduct. It does not lie in the mouth of wrongdoers to set up a title derived from a violation of our neutrality. The cases in which this doctrine has been recognized and applied, have been cited at the bar, and are so numerous and so uniform, that it would be a waste of time to discuss them, or to examine the reasoning by which they are supported: More especially as no inclination exists on the part of the Court to question the soundness of these decisions. If, indeed, the question were entirely new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than a direct intervention of the government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled, that as between the captors and the captured, the question can never be litigated. It can arise only upon a claim of the neutral sovereign asserted in his own Courts or the Courts of the power having cognizance of the capture itself for the purposes of prize. And by analogy to this course of proceeding, the interposition of our own government might seem fit to have been required before cognizance of the wrong could be taken by our Courts. But the practice from the beginning in this class of causes, a period of nearly 30 years, has been uniformly the other way; and it is now too late to disturb it. If any inconvenience should grow out of it, from reasons of state policy or executive discretion, it is competent for Congress to apply at its pleasure the proper remedy. . . .

An objection . . . has been urged at the bar . . . that public ships of war are exempted from the local jurisdiction by the universal assent of nations; and that as all property captured by such property is captured for the sovereign, it is, by

parity of reasoning, entitled to the like exemption, for no sovereign is answerable for his acts to the tribunals of any foreign sovereign. . . . But there is nothing in the law of nations which forbids a foreign sovereign . . . from voluntarily becoming a party to a suit in the tribunals of another country, or from asserting there any personal, or proprietary, or sovereign rights, which may be properly recognized and enforced by such tribunals. It is a mere matter of his own good will and pleasure; and if he happens to hold a private domain within another territory, it may be that he cannot obtain full redress for any injury to it, except through the instrumentality of its Courts of justice. It may therefore be justly laid down as a general proposition, that all persons and property within the territorial jurisdiction of a sovereign, are amenable to the jurisdiction of himself or his Courts: and that the exceptions to this rule are such only as by common usage, and public policy have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights. . . . We are of opinion that the objection cannot be sustained; and that whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our Courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been devested by a violation of our neutrality. . . .

Upon the whole, it is the opinion of the Court that the decree of the Circuit Court should be affirmed, with costs.

NOTE.—The much-quoted statement of Justice Story to the effect that "there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale" must be construed with reference to the facts with which he was dealing. The warship of his time was no such instrument of destruction as it now is, nor did many of them differ so radically in construction from a merchant ship as is now the case. Neither Justice Story nor any other judge of his day would have thought it consistent with neutrality for a military force of several thousand men to be organized and equipped in a neutral country; yet Washington's little army, which compelled the surrender of Cornwallis at Yorktown, was a much less formidable military instrument than is a modern dreadnaught. In Ex parte Chavasse (1865), 11 Jurist, n. s. 400, Lord Chancellor Westbury quoted the passage from Justice Story's opinion cited above, and continued:

> I take this passage to be a very correct representation of the present state of the law of England also. For if a British shipbuilder builds a vessel of war in an English port, and arms and

equips her for war, bona fide on his own account, as an article of merchandise, and not under or by virtue of any agreement, understanding or consent with a belligerent power, he may lawfully, if acting bona fide, send the ship so armed and equipped for sale as merchandise in a belligerent country, and will not in so doing violate the provisions or incur the penalties of the Foreign Enlistment Act.

It should be observed however that the sort of transaction described by the Lord Chancellor never arises in the shipbuilding business as it is now conducted. Whatever may have been the practice in the time of Justice Story or of Lord Westbury, at the present day warships are never built as a mercantile venture in the hope that when offered for sale a purchaser will be found. They are always built to order, and their construction is always intended for the benefit of an ascertained government. Just prior to the outbreak of war with Spain, the United States purchased from Brazil two war vessels in course of construction in British shipyards. Upon the declaration of war, the British Government notified the American Government that these vessels when completed would not be allowed to leave British waters until the restoration of peace. As further illustrating the attitude of neutral governments towards trade in vessels see United States of America v. Pelly (1899), 4 Com. Cases, 100, *ante*, p. 216.

The use of neutral territory for the building and equipping of war vessels was most fully discussed in connection with the Alabama controversy. This case, notable not only as establishing a new standard of neutral duties but also as the most important example of international arbitration, is discussed in Bonfils (Fauchille), 619, 959; Bernard, *The Neutrality of Great Britain during the American Civil War;* Cobbett, *Cases and Opinions*, II, 320; Cushing, *The Treaty of Washington;* Foster, *A Century of American Diplomacy;* Moore, *Int. Arb.*, I, ch. xiv; Moore, *Digest*, VII, 1059. The Alabama case is of importance in the history of the development of the law of neutrality because of the Three Rules of the Treaty of Washington. The United States insisted that these Rules were a correct statement of existing law. Great Britain denied this, but expressed her willingness to have her conduct judged by them. The Rules were as follows:

A neutral Government is bound—

First, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly, to exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

Malloy, *Treaties and Conventions*, I, 703.

Whether these Rules were law when formulated or not, they were substantially embodied in Article 8 of the Convention respecting the Rights and Duties of Neutral Powers in Naval War adopted at The Hague Conference of 1907.

SETON, MAITLAND & CO. v. LOW.

SUPREME COURT OF JUDICATURE OF NEW YORK. 1799.
1 Johnson, 1.

This was an action on an open policy of insurance, dated the 3d of May, 1797, upon "all kinds of lawful goods and merchandises" on board the brig Hannah, from New York to the Havana. . . . No disclosure was made to the company, at the time of obtaining the insurance, of the nature of the cargo. . . . The Hannah was captured, and carried into New Providence, where the cargo was libelled, [and part of it condemned as contraband.] The plaintiffs, on receiving intelligence of the capture and proceedings above mentioned . . . abandoned to the company, the cargo, and delivered to them the usual proofs of interest and loss. . . .

KENT, J. Two questions were raised, on the argument in this case.

1. Whether the contraband goods were lawful, within the meaning of the policy.

2. If lawful, whether the assured were bound to disclose to the defendant the fact, that part of the cargo was contraband of war.

On the first point, I am of opinion, that the contraband goods were lawful goods, and that whatever is not prohibited to be exported, by the positive law of the country, is lawful. It may be said, that the law of nations is part of the municipal law of the land, and that by that law, (and which, so far as it concerns the present question, is expressly incorporated into our treaty of commerce with Great Britain) contraband trade is prohibited to neutrals, and, consequently, unlawful. This reasoning is not destitute of force, but the fact is, that the law of nations does not declare the trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers; and this it does from necessity. A neutral nation has nothing to do with the war, and is under no moral obligation to abandon or abridge its trade; and yet, at the same time, from the law of

necessity, as Vattel observes, the powers at war have a right to seize and confiscate the contraband goods, and this they may do from the principle of self-defence. The right of the hostile power to seize, this same very moral and correct writer continues to observe, does not destroy the right of the neutral to transport. They are rights which may, at times, reciprocally clash and injure each other. But this collision is the effect of inevitable necessity, and the neutral has no just cause to complain. A trade by a neutral in articles contraband of war, is, therefore, a lawful trade, though a trade, from necessity, subject to inconvenience and loss.

With respect to the second question, the reason of the rule requiring due disclosure of all facts, within the knowledge of either party, is to prevent fraud, and encourage good faith. . . . There are, however, certain circumstances, appertaining to every contract, which each party is presumed to know, and need not be told. . . . If an underwriter insures a private ship of war, he need not be told of secret expeditions, &c. for he is bound to know, that such are the presumed destinations of such vessels. All matters of general notoriety and speculation, every party is bound to know, at his own peril. . . . The underwriter is presumed to know that the neutral trade undergoes no abridgement, or abandonment, in war; that it is likely to consist of the same kind of articles in war as in peace, and, consequently, that the nature of the cargo need not be disclosed. . . .

My opinion, accordingly is, that judgment be rendered for the plaintiffs as for a total loss. . . .

[Lansing, C. J., and Lewis, J., delivered concurring opinions. Benson, J., dissented.]

THE HELEN.

High Court of Admiralty of Great Britain. 1865.
Law Reports, 1 Ad. and Ecc. 1.

In this case, the master sued for wages upon an agreement entered into between himself and the defendants, the owners of the Helen.

The defendants, in the fourth article of their answer, alleged that "the agreement was made and entered into for the purpose of running the blockade of the Southern ports of the United

States of America, or one of them, and was and is contrary to law, and cannot be recognized or enforced by this Honourable Court." . . .

Dr. LUSHINGTON. This is a motion by the plaintiff to reject the fourth article of the defendants' answer. The parties in this cause are John Andrews Wardell, formerly the master of the Helen, plaintiff, and the Albion Trading Company, the owners of the ship, defendants. The master sues for wages (with certain premiums added) alleged to have been earned between July, 1864, and March, 1865. The answer states that according to the agreement as set forth by the defendants, the plaintiff has been paid all that was due to him. This part of the answer is not objected to. The fourth and last article is the one objected to—It alleges that the agreement was entered into for the purpose of breaking the blockade of the Southern States of America; that such an agreement is contrary to law, and cannot be enforced by this Court. In the course of the argument, the judgment in Ex parte Chavasse re Grazebrook, 34 L. J. (Bkr.), 17, was cited as governing the case; a judgment recently delivered by Lord Westbury whilst he was Lord Chancellor. The law there laid down is briefly stated, that a contract of partnership in blockade-running is not contrary to the municipal law of this country; and by the decree the partnership was declared valid, and the accounts ordered accordingly. It was admitted that this decision is directly applicable to the present case, a suit to recover wages according to a contract with respect to an intended adventure to break the blockade.

That a decision of the Lord Chancellor is to be treated by this Court with the greatest respect there can be no doubt, but is it absolutely binding? There are three tribunals whose decisions are absolutely binding upon the Court of Admiralty: 1. The House of Lords. 2. The Privy Council. 3. The Courts of Common Law when deciding upon the construction of a statute. If a decision of any of these tribunals is cited, all that the Court of Admiralty can do is to inquire if the decision is applicable to the case. If so, then it is the duty of the Court to obey, whatever may be its own judgment.

No other decisions are, I believe, absolutely binding on the Court. On the present occasion, no decision has been cited from the House of Lords or Privy Council. Whatever, therefore, may be the effect of the decisions of other tribunals, I am not relieved from the duty of reconsidering the whole question.

An intimation has been given that this case will be carried to the Judicial Committee [of the Privy Council]; if so, I apprehend that tribunal might be inclined to consider me remiss in my duty if I had omitted to form an independent judgment on the case, and to state it with my reasons. It is, I conceive, admitted on all hands, that the Court must enforce the agreement with the master, unless it is satisfied that such agreement is illegal by the municipal law of Great Britain. In order to prove this proposition, the defendants say that the agreement to break the blockade by a neutral ship is, on the part of all persons concerned, illegal according to the law of nations, and that the law of nations is a part of the municipal law of the land—*ergo,* this contract was illegal by municipal law.

Now a good deal may depend on the sense in which the word "illegal" is used. I am strongly inclined to think that the defendants attach to it a more extensive meaning than it can properly bear, or was intended to bear by those who used it. The true meaning, I think, is that all such contracts are illegal so far, that if carried out they would lead to acts which might, under certain circumstances, expose the parties concerned to such penal consequences as are sanctioned by international law, for breach of blockade, or for the carrying of contraband. If so, the illegality is of a limited character. For instance, suppose a vessel after breaking the blockade completes her voyage home, and is afterwards seized on another voyage, the original taint of illegality—whatever it may have been—is purged, and the ship cannot be condemned; yet if the voyage was, *ab initio,* wholly and absolutely illegal, both by the law of nations and the municipal law, why should its successful termination purge the offence? Let me consider the relative situation of the parties. A neutral country has a right to trade with all other countries in time of peace. One of these countries becomes a belligerent, and is blockaded. Why should the right of the neutral be affected by the acts of the other belligerent? The answer of the blockading power is: "Mine is a just and necessary war," a matter which, in ordinary cases, the neutral cannot question, "I must seize contraband, I must enforce blockade, to carry on the war." In this state of things there has been a long and admitted usage on the part of all civilized states—a concession by both parties, the belligerent and the neutral—a universal usage which constitutes the law of nations. It is only with reference to this usage that the belligerent can interfere with the neutral. Suppose no question of blockade or contraband,

no belligerent could claim a right of seizure on the high seas of a neutral vessel going to the port of another belligerent, however essential to his interest it might be so to do.

What is the usage as to blockade? There are several conditions to be observed in order to justify the seizure of a ship for breach of blockade. The blockade must be effectual and (save accidental interruption by weather) constantly enforced. The neutral vessel must be taken *in delicto.* The blockade must be enforced against all nations alike, including the belligerent one. When all the necessary conditions are satisfied, then, by the usage of nations, the belligerent is allowed to capture and condemn neutral vessels without remonstrance from the neutral state. It never has been a part of admitted common usage that such voyages should be deemed illegal by the neutral state, still less that the neutral state should be bound to prevent them; the belligerent has not a shadow of right to require more than universal usage has given him, and has no pretence to say to the neutral: "You shall help me to enforce my belligerent right by curtailing your own freedom of commerce, and making that illegal by your own law which was not so before." This doctrine is not inconsistent with the maxim that the law of nations is part of the law of the land. That fact is, the law of nations has never declared that a neutral state is bound to impede or diminish its own trade by municipal restriction. Our own Foreign Enlistment Act is itself a proof that to constitute transactions between British subjects, when neutral and belligerents, a municipal offence by the law of Great Britain, a statute was necessary. If the acts mentioned in that statute were in themselves a violation of municipal law, why any statute at all? I am now speaking of fitting out ships of war, not of levying soldiers, which is altogether a different matter. Then how stands the case upon authority? I may here say, that in principle, there is no essential difference whether the question of breach of municipal law is raised with regard to contraband or breach of blockade.

Mr. Duer is the only text-writer who maintains an opinion contrary to what I have stated to be the law. He maintains it with much ability and acuteness, but he stands alone. He himself admits that an insurance of a contraband voyage is no offence against municipal law of a neutral country, according to the practice of all the principal states of continental Europe. (Duer, *Marine Insurance,* I. lecture vii). In the American courts the question has been more than once agitated, but with

the same result. In the case of The Santissima Trinidad, 7 Wheaton 340, Mr. Justice Story says:—"It is apparent that, though equipped as a vessel of war, she (The Independencia) was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage, she would have been justly condemned as good prize, and for being engaged in a traffic prohibited by the law of nations. But there is nothing in our law or in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation." "There is no pretence for saying that the original outfit on the voyage was illegal." Again, in Richardson v. The Marine Insurance Company, 6 Mass., 112, Parsons, C. J., observes:—"The last class we shall mention is the transportation by a neutral of goods contraband of war to the country of either of the belligerent powers. And here, it is said, that these voyages are prohibited by the law of nations, which forms a part of the municipal law of every state, and, consequently, that an insurance on such voyages made in a neutral state is prohibited by the laws of that state, and therefore, as in the case of an insurance on interdicted commerce, is void. That there are certain laws which form a part of the municipal laws of all civilized states, regulating their mutual intercourse and duties, and thence called the law of nations, must be admitted: as, for instance, the law of nations affecting the rights and the security of ambassadors. But we do not consider the law of nations, ascertaining what voyages or merchandise are contraband of war, as having the same extent and effect. It is agreed by every civilized state that, if the subject of a neutral power shall attempt to furnish either of the belligerent sovereigns with goods contraband of war, the other may rightfully seize and condemn them as prize. But we do not know of any rule established by the law of nations that the neutral shipper of goods contraband of war, is an offender against his own sovereign, and liable to be punished by the municipal laws of his own country. When a neutral sovereign is notified of a declaration of war, he may, and usually does, notify his subjects of it, with orders to decline all contraband trade with the nations at war, declaring that, if they are taken in it, he cannot protect them, but not announcing the trade as a violation of his own

laws. Should their sovereign offer to protect them, his conduct would be incompatible with his neutrality. And as, on the one hand, he cannot complain of the confiscation of his subjects' goods, so, on the other, the power at war does not impute to him these practices of his subjects. A neutral merchant is not obliged to regard the state of war between other nations, but if he ships goods prohibited *jure belli,* they may be rightfully seized and condemned. It is one of the cases where two conflicting rights exist, which either party may exercise without charging the other with doing wrong. As the transportation is not prohibited by the laws of the neutral sovereign, his subjects may lawfully be concerned in it; and, as the right of war lawfully authorizes a belligerent power to seize and condemn the goods, he may lawfully do it." Lastly, in Seton, Maitland & Co. v. Low, 1 Johnson, 5, Mr. Justice Kent says:—"I am of opinion that the contraband goods were lawful goods, and that whatever is not prohibited to be exported by the positive law of the country is lawful. It may be said that the law of nations is part of the municipal law of the land, and that by that law contraband trade is prohibited to neutrals, and, consequently, unlawful. This reasoning is not destitute of force; but the fact is that the law of nations does not declare the trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers." . . .

In the English Courts the only case in which the point has been actually decided is the recent case before the Lord Chancellor, which I have already adverted to. With regard to the cases in Mr. Duer's book, Naylor v. Taylor, 9 B. & C. 718, Medeiross v. Hill, 8 Bing. 231, it is enough to say that, in the view which the court eventually took of the facts, the question of law did not arise. It is in these two cases impossible to say with certainty what was the opinion of the judges at *nisi prius.*

I cannot entertain any doubt as to the judgment I ought to pronounce in this case. It appears that principle, authority, and usage unite in calling on me to reject the new doctrine that, to carry on trade with a blockaded port, is or ought to be a municipal offence by the law of nations. I must direct the 4th article of the answer to be struck out. I cannot pass by the fact that the attempt to introduce this novel doctrine comes from an avowed *particeps criminis,* who seeks to benefit himself by it. As he has failed on every ground, he must pay the cost of his experiment.

NOTE.—Since the outbreak of the Great War of 1914 there has been much discussion, especially in America, of the duty of neutral states to prevent the export of contraband goods. This is one of the oldest questions in European diplomacy. Almost a thousand years ago the Byzantine Emperor protested to the Doge of Venice against the sale by Venetians of arms and ship timbers to the Saracens with whom he was at war, and threatened to burn any of their vessels engaged in such traffic. The Pope also denounced this unholy commerce with the infidels. But it was so profitable that neither the Emperor nor the Pope nor the Doge succeeded in suppressing it. Each belligerent had to protect itself against trade in contraband as best it could. England endeavored to meet the situation by admitting foreign merchants to trade in England only on condition that they would not sell to England's enemies. During the Crusades, which were wars of the adherents of one religion against the adherents of another religion rather than of state against state, the Papacy was able to enforce to a considerable extent its prohibition of contraband trade with the Saracens, but as soon as the wars with the infidels gave way to wars between Christian states themselves the basis of the Papal prohibition disappeared and contraband trade was resumed. The absence of any conception of neutral obligation, as such obligation is now understood, even permitted the enlistment of soldiers in the territory of neutral states. Since neutrals were thus ready to aid belligerents, the latter sought to protect themselves by interfering as much as possible with the trade carried on with their enemies. In course of time, by treaty and by general custom, such interference came to be restricted to trade in articles which could be used in the operations of war, and by 1600 the right of a belligerent to suppress trade in contraband was generally recognized. This appears from the writings of both Gentilis and Grotius. Both these men, but especially Grotius, felt that there was something immoral, or at least reprehensible, in contraband trade and that it ought to be prevented, but neither of them held that the suppression of such trade was the duty of a neutral state. In the last three centuries there have been a few instances in which neutral states have attempted to restrain their subjects from exporting contraband, but whether this was because of their conception of neutral duty or because of a desire to protect their own interests is not always clear. The present rule however was given definite form by the United States in Hamilton's Treasury Circular of August 4, 1793:

> The purchasing within, and exporting from the United States, by way of merchandise, articles commonly called contraband, being generally warlike instruments and military stores, is free to all the parties at war, and is not to be interfered with.
>
> Moore, *Digest*, VII, 955.

Both England and France protested against the principle thus announced. In defending it the Secretary of State, Jefferson, stated what still remains the chief reason why neutral governments refuse to attempt to suppress trade in contraband: "It would be hard in principle and impossible in practice."

That a contract for the carriage of contraband goods is enforceable was held in Northern Pacific Railway v. American Trading Co. (1904), 195 U. S. 439, 465.

One of the best statements of the duty of a neutral state as to trade in contraband is Secretary Lansing's note of August 12, 1915, in reply to the protest of Austria-Hungary of June 29, 1915. Other discussions of particular value may be found in J. W. Garner, "Some True and False Conceptions Regarding the Duty of Neutrals in Respect to the Sale and Exportation of Arms and Munitions to Belligerents," *Proceedings of Amer. Soc. Int. Law, 1916,* 18; W. C. Morey, "The Sale of Munitions of War," *Am. Jour. Int. Law,* X, 467; C. N. Gregory, "Neutrality and the Sale of Arms," Ib. X, 543; W. C. Dennis, "The Right of Citizens of Neutral Countries to Sell and Export Arms and Munitions of War to Belligerents," *Annals of the American Academy of Political and Social Science,* LX, 168. See also Pearson v. Parson (1901), 108 Fed. 461; Sir William Vernon Harcourt, *Letters of Historians* (defending the right of British citizens to sell arms to the Confederate States); Pyke, *The Law of Contraband of War,* ch. vi; Moore, *Digest,* VII, 748.

As to the duty of a neutral state to prevent acts of war within its jurisdiction see The General Armstrong, Moore, *Int. Arb.* II, 1071. If a neutral is unable or unwilling to enforce its neutrality, a belligerent may be justified in resorting to self-help in order to avert serious injury. Japan appealed to this principle in defense of her conduct in attacking the Russian destroyer Ryeshitelni while lying in the neutral port of Chefoo, China. Whether the facts were such as to sustain the Japanese contention is undetermined. For opposing views see Hershey, *International Law and Diplomacy of the Russo-Japanese War,* 260, and Takahashi, 437.

As to whether citizens of neutral states may make loans in support of an insurrection against the government of a friendly state, see De Wütz v. Hendricks (1824), 9 Moore, C. P., 586, and Kennett v. Chambers (1852), 14 Howard, 38.

As to offenses under the British Foreign Enlistment Act, see The Gauntlet (1872), L. R. 4 P. C. 184; The Salvador (1870), L. R. 3 P. C. 218; The International (1871), L. R. 3 A. & E. 321; Regina v. Sandoval (1887), 56 L. T. 526; and Regina v. Jameson (1896), L. R. [1896] 2 Q. B. 425. For the construction of the American Neutrality Act, see Wiborg v. United States (1896), 163 U. S. 632; United States v. Trumbull (1891), 48 Fed. 99; S. C. (1893), 56 Fed. 505.

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